

No. 10-0001

IN THE SPECIAL COURT OF REVIEW

Inquiry Concerning a Judge, No. 96

**APPENDIX IN SUPPORT OF MOTION TO DISMISS
OF THE HONORABLE SHARON KELLER**

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- A. Commission's Findings, Conclusions and Order of Public Warning, Before the State Commission on Judicial Conduct, *Inquiry Concerning Honorable Sharon Keller Judge No. 96*, filed July 16, 2010
- B. M. A. Robbins, *Bad Law? Judicial Conduct Commission Examiner Questions Basis for Public Warning in Keller Case*, Texas Lawyer, July 26, 2010
- C. Notice of Formal Proceedings, Before the State Commission on Judicial Conduct, *Inquiry Concerning a Judge, No. 96*, Filed February 19, 2009
- D. Appointment of a Special Master Requested by the State Commission on Judicial conduct, by the Supreme Court of Texas, signed April 9, 2009, Misc. Docket No. 09-9063
- E. First Amended Notice of Formal Proceedings, Before the State Commission on Judicial Conduct, *Inquiry Concerning a Judge No. 96*, filed June 15, 2009
- F. Special Master's Findings of Fact, filed January 20, 2010, Before the State Commission on Judicial Conduct, *Inquiry Concerning a Judge No. 96*
- G. Texas Constitution, Art. 5, § 1-a
- H. Texas Government Code, Chapter 33, State Commission on Judicial Conduct
- I. Judge Keller's request for appointment of a Special Court of Review
- J. Chief Justice Jefferson's letter appointing Special Court of Review
- K. Procedural Rules for the Removal or Retirement of Judges

- L. June 4 to June 11, 2010, email string between Bob Warneke, Charles L. Babcock, and Amanda Zimmerman Patrick, Re: Judge No. 96 - Recusal
- M. Excerpt of statements by Special Counsel McKetta at the June 18, 2010 Hearing Before the State Commission on Judicial Conduct
- N. Excerpt of testimony of Edward Marty, former General Counsel of the State Commission on Judicial Conduct
- O. Excerpts of the July 10, 2009, Hearing on Motions before the Honorable David A. Berchermann, Special Master in *Inquiry Concerning a Judge No. 96*, Before the State Commission on Judicial Conduct
- P. State Commission on Judicial Conduct's Response to Respondent's First Request for Admissions, Before the State Commission on Judicial Conduct, *Inquiry Concerning a Judge No. 96*, served on April 25, 2009
- Q. Excerpt of testimony of The Honorable Cheryl Johnson, Justice of the Texas Court of Criminal Appeals
- R. Order of the Supreme Court of Texas, Appointment to the State Commission on Judicial Conduct, Misc. Docket No. 04-9042, signed March 19, 2004 (Appointment of Honorable Michael R. Fields, pp. 1-2)

Senate Journal of Texas, 79th Leg., May 20, 2005 (Confirmation of Michael R. Fields pp. 3-4)

Senate Journal of Texas, 81st Leg., February 9, 2009 (Appointment of Tom Cunningham, pp. 5-6)

Senate Journal of Texas, 81st Leg., April 8, 2009 (Confirmation of Tom Cunningham, pp. 7-9)

Order of the Supreme Court of Texas, Appointment to the State Commission on Judicial Conduct, Misc. Docket No. 07-9196, signed November 27, 2007 (Appointment of Honorable Jan Patterson, pp. 10-11)

Senate Journal of Texas, 81st Leg., April 8, 2009 (Confirmation of Honorable Janet P. Patterson, pp. 12-14)

Senate Journal of Texas, 81st Leg., February 2, 2009, (Appointment of Karry Kay Matson, pp. 15-16)

Senate Journal of Texas, 81st Leg., April 8, 2009 (Confirmation of Karry Kay Matson, pp. 17-19)

Senate Journal of Texas, 81st Leg., April 28, 2009 (Appointment of Patti H. Johnson, pp. 20-21)

Senate Journal of Texas, 81st Leg., May 13, 2009 (Confirmation of Patti Hutton Johnson, pp. 21-24)

- S. Excerpts of the June 18, 2010, Objections Hearing Before the State Commission on Judicial Conduct, *Inquiry Concerning a Judge No. 96*
- T. June 13, 2010, letter from Charles L. Babcock to Bob Warneke, Re: Qualifications of Certain of the Commissioners on the Commission on Judicial Conduct

Appendix A

FILE STAMPED COPY

By et Date 7/16/10
Clerk of the Commission
State Commission on Judicial Conduct



**BEFORE THE
STATE COMMISSION ON JUDICIAL CONDUCT**

**INQUIRY CONCERNING
HONORABLE SHARON KELLER
JUDGE NO. 96**

**COMMISSION'S FINDINGS, CONCLUSIONS AND
ORDER OF PUBLIC WARNING**

On the 18th day of June, 2010, the State Commission on Judicial Conduct considered the Record of the Formal Proceedings involving Judge No. 96, the Honorable Sharon Keller, Presiding Judge of the Texas Court of Criminal Appeals, Austin, Travis County, Texas. The Record included the *Special Master's Findings of Fact* signed on January 19, 2010 by the Honorable David A. Berchermann, Jr., Special Master presiding, as well as the transcript of the testimony and the exhibits presented at the evidentiary hearing before Judge Berchermann.

Before taking action on the Record of the Formal Proceedings, the Commission also considered the *Notice of Formal Proceedings* filed with the Commission on February 19, 2009; *The Honorable Sharon Keller's Original Verified Answer to the Notice of Formal Proceedings of the Texas State Commission on Judicial Conduct* filed on March 24, 2009; the *First Amended Notice of Formal Proceedings* filed on June 15, 2009; *The Honorable Sharon Keller's Verified Answer to the First Amended Notice of Formal Proceedings of the Texas State Commission on Judicial Conduct and Special Exception* filed on August 14, 2009; *Examiner's Objections and Responses to Special Master's Findings of Fact* filed on February 17, 2010; *The Honorable*

Sharon Keller's Objections to the Special Master's Findings of Fact filed on February 18, 2010; *The Honorable Sharon Keller's Response to the Examiner's Objections to the Special Master's Findings of Fact* filed on June 4, 2010, *The Examiner's Reply to Judge Keller's June 4, 2010 'Response'* filed on June 14, 2010; *Judge Keller's Surreply to the Examiner's Reply to Judge Keller's June 14, 2010 'Response'* filed on June 15, 2010; and heard extensive oral argument from Judge Keller's counsel, Charles A. Babcock, and Special Counsel John J. McKetta, III, on June 18, 2010.

After due consideration, the Commission enters the following:

RULINGS

Regarding the *Motion for Application of Proper Evidentiary Standard of Respondent*, the Honorable Judge Keller filed on July 31, 2009, and reurged before the Commission in *The Honorable Sharon Keller's Response to the Examiner's Objections to the Special Master's Findings of Fact* filed on June 4, 2010, the Commission **DENIES** the Motion.

Regarding *Respondent, the Honorable Sharon Keller's Motion to Strike First Amended Notice of Formal Proceedings, Motion to Show Authority, and Brief in Support* filed on June 24, 2009, and reurged before the Commission in *The Honorable Sharon Keller's Response to the Examiner's Objections to the Special Master's Findings of Fact* filed on June 4, 2010, the Commission **DENIES** the Motion.

REVIEW BY THE COMMISSION

Pursuant to Rule 10(m) of the Procedural Rules for the Removal or Retirement of Judges, adopted and promulgated by Order of the Supreme Court of Texas pursuant to its authority under Article 5, sec. 1-a(11) of the Texas Constitution, the Commission has carefully reviewed and considered the Report of the Special Master with due regard to the observations of the Special Master as to the conduct of Judge Keller and the others involved in the events in question. It is the duty and the function of the Commission to determine the proper disposition of this matter based upon the record of the proceedings, the Special Master's Report, the objections and responses to the Special Master's Report submitted by the Examiner and Judge Keller, as well as the arguments of counsel and any other materials properly before the Commission.

FINDINGS OF FACT

The Commission makes the following findings of fact, having been proven by a preponderance of the evidence:

1. At all times relevant hereto, the Honorable Judge Sharon Keller has been the Presiding Judge of the Texas Court of Criminal Appeals ("TCCA") and continues to perform her judicial duties.

2. Judge Keller was elected to the TCCA in 1994. In 2000 she was elected Presiding Judge, and in 2006 she was re-elected for another six-year term that expires in 2012.
3. A Texas jury convicted Michael Wayne Richard ("Richard") of capital murder stemming from an incident that occurred on August 18, 1986. He was sentenced to death and went through the state and federal appeals processes. After exhausting his then-available appeals, he was scheduled for execution on September 25, 2007, anytime after 6:00 p.m.
4. On the morning of September 25, 2007, the United States Supreme Court announced that it would hear the case *Baze v. Rees*, which raised the issue whether Kentucky's three-drug protocol for lethal injection violated the Eighth Amendment's prohibition against cruel and unusual punishment. The decision in *Baze* would probably impact Texas's death penalty procedure, which uses a similar three drug protocol.
5. The Texas Defender Service ("TDS"), which represented Richard, thus had only a few hours to seek a stay of Richard's execution based on the United States Supreme Court's decision that morning.
6. Because TDS would likely ask the United States Supreme Court to stay Richard's execution pursuant to the Court's decision in *Baze* to hear the lethal injection case (assuming the lower courts did not first grant a stay), TDS had to do so through a writ of habeas corpus.
7. To present a habeas claim to the United States Supreme Court, a litigant must exhaust all possible state remedies; that is, the United States Supreme Court will not consider a habeas claim—even in a death penalty case—unless the state courts first pass on the issue. See 28 U.S.C. § 2254.
8. Before the United States Supreme Court would even consider whether to stay Richard's execution based on its decision to hear *Baze*, Richard had to exhaust that argument before the Texas courts; that is, he had to present a lethal injection argument to the TCCA.
9. Only after the TCCA rejected the claim would Richard be able to seek relief from the United States Supreme Court.
10. Richard's lawyer's failure to raise the lethal injection argument to the TCCA impaired his ability to successfully ask the United States Supreme Court to stay his execution.
11. The TCCA's Execution-day Procedures call for the assignment of a designated judge to be in charge of each scheduled execution, and provide as follows:

All communications regarding the scheduled execution shall first be referred to the assigned judge. The term "communications" includes pleadings, telephone calls, faxes, e-mails, and any other means of communication with the Court. The assigned judge may call a special conference or gather votes by telephone, e-mail, fax, or other form of communication.

If the communication includes a request for stay of execution, the assigned judge shall contact, by any reasonable means, the other members of the court and request a vote on the motion to stay. "Reasonable means" includes calling a special conference and contact by electronic communication. Non-assigned judges will provide to the assigned judge an adequate means of contact, such as home and cellular telephone numbers or other means of prompt contact.

12. The TCCA Execution-day Procedures were unwritten until November 2007, when they were put in writing. It is undisputed that the oral policy in effect on September 25, 2007 was identical to the written procedures created in November 2007.
13. The procedures set out in paragraph 11, above, were in effect at all dates relevant to this proceeding, and Judge Keller knew and was familiar with them.
14. The TCCA Execution-day Procedures are the vehicle by which the TCCA assures that one judge will be informed about the circumstances of the scheduled execution and will be available at all times on execution day up until the event of execution, no matter how late that may occur. The TCCA Execution-day Procedures were adopted as part of the Court's responsibility for due process. They assure that persons scheduled to be executed on a given day will have access to an open Court at all times prior to the event of execution. The TCCA Execution-day Procedures require that all communications on that date regarding the scheduled execution be first referred to the assigned judge, so that there will be no inconsistency or unintended consequences in the addressing and disposition of those communications. The TCCA Execution-day Procedures had no exception for administrative or non-substantive communications, but encompassed all communications regarding the scheduled execution.
15. The term "communications" in the TCCA Execution-day Procedures in effect on September 25, 2007 included pleadings, telephone calls, faxes, e-mails, and other means of communication.

16. The TCCA's Execution-day Procedures are a method to assure that no delay or misdirection might occur to last-minute communications regarding the scheduled execution. Its mandatory "shall" and its encompassing "all communications" are safeguards to assure that the Court remains open up to the moment of execution, in case any issue – slight or great – needs attention before the irreversible event of death. Thus, the TCCA's Execution-day Procedures are a means to safeguard against erroneous or improvident execution.
17. Texas Rule of Appellate Procedure 9.2(a) provides as follows:
 - (a) *With Whom.* A document is filed in an appellate court by delivering it to:
 - (1) the clerk of the court in which the document is to be filed; or
 - (2) a justice or judge of that court who is willing to accept delivery. A justice or judge who accepts delivery must note on the document the date and time of delivery, which will be considered the time of filing, and must promptly send it to the clerk.
18. TRAP 9.2(a) provides persons with a legal interest in a proceeding a means of access to the appellate courts beyond the normal office hours of the court clerks and the right to be heard by the clerk or a judge as to the acceptance of a filing after hours.
19. On the date of a scheduled execution, the TCCA's Execution-day Procedures mandated that every communication regarding the day's scheduled execution be first referred to the assigned judge. All of the TCCA judges, including Judge Keller, knew that September 25, 2007 was an execution date.
20. On September 25, 2007, Judge Keller knew that Richard was the person scheduled to be executed at 6:00 p.m. that evening.
21. The Honorable Judge Cheryl Johnson was the assigned judge under the TCCA's Execution-day Procedures with respect to Richard's execution on September 25, 2007.
22. The identity of the assigned judge for the September 25, 2007 execution was not public information.
23. The assigned Judge for the September 25, 2007 execution under the TCCA's Execution-day Procedures was unknown to Richard's representatives.

24. Judge Johnson and some other TCCA judges intended to stay at the TCCA on September 25, 2007, and remain available until word of the execution was received.
25. At 11:12 a.m., on September 25, 2007, Judge Keller received a copy of the *Baze* petition for certiorari, which the United States Supreme Court had granted, and a copy of the Kentucky Supreme Court decision in *Baze*. At 11:13 a.m., Judge Keller acknowledged her receipt of the information.
26. At 11:29 a.m., on September 25, 2007, TCCA General Counsel Edward Marty ("Marty") sent an e-mail to all of the TCCA judges with the subject line, "Execution Schedule." In the e-mail Marty informed the TCCA judges, including Judge Keller, that, "The [United States] Supreme Court has just granted cert on two Kentucky cases in which lethal injection was claimed to be cruel and unusual . . . I do not know if Michael Wayne Richard will try to stay his execution for tonight over this issue or in what court."
27. At 1:30 p.m., on September 25, 2007, the Honorable Judge Cathy Cochran informed members of the TCCA, including Judge Keller, and Marty of an internet link to the Kentucky Supreme Court's unanimous decision in *Baze*.
28. Members of the TCCA, including Judge Keller, and Marty were aware on September 25, 2007 of the United States Supreme Court's decision that morning to grant certiorari in *Baze* and to set the case for argument.
29. Members of the TCCA anticipated that Richard's counsel would likely attempt some type of filing with the TCCA based on *Baze*.
30. At approximately 11:40 a.m., on September 25, 2007, TDS lawyers—including David Dow ("Dow"), Greg Wiercioch ("Wiercioch"), and Alma Lagarda ("Lagarda")—participated in a conference call, during which they first discussed the United States Supreme Court's decision that morning. These lawyers were working in TDS's Houston office.
31. After the 11:40 a.m. call, Dow, a professor of law at the University of Houston and TDS's Litigation Director, instructed Lagarda, a junior attorney, to draft a writ of prohibition, a motion for leave to file the writ, a successor application for a writ of habeas corpus, and a motion to stay the execution, based on the United States Supreme Court's decision to review Kentucky's lethal injection procedure.
32. Dow and Wiercioch focused on a so-called *Atkins* claim that they planned to raise, challenging Richard's execution based on mental retardation.

33. Dow believed the *Atkins* claim was a more effective vehicle for obtaining a stay of execution, especially because the United States Supreme Court had never before considered the constitutionality of lethal injection.
34. In the early afternoon of September 25, 2007, Marty began drafting a proposed order for the TCCA in anticipation of Richard's filing based on *Baze*. By 3:20 p.m., Marty had completed his preparation of a draft order denying relief, if any such filing were to occur.
35. The Honorable Judge Tom Price drafted a dissenting opinion in the event Richard's anticipated request for stay was denied.
36. At approximately 2:40 p.m., on September 25, 2007, Marty sent an e-mail to all of the TCCA judges, including Judge Keller, with the subject line, "Michael Wayne Richard update." In the e-mail, Marty informed the TCCA judges that the Harris County District Attorney's Office had just called and informed him that Richard's lawyers had called the Harris County District Attorney's office and confirmed that Richard's lawyers planned to file a writ of prohibition and subsequent application on behalf of Richard based on the issue in *Baze* for which certiorari had been granted that morning. Marty promised to keep the judges informed and circulate a copy of any pleadings when he received them.
37. Judge Keller left her chambers at the TCCA at about 3:45 p.m., on September 25, 2007, and returned home. Judge Keller did not return to the TCCA that day. Before she left for the day, Judge Keller had seen the 2:40 p.m. e-mail from Marty concerning anticipated filings on behalf of Richard.
38. Around 3:30 p.m., on September 25, 2007, Lagarda completed her draft of the petition of the writ of prohibition and sent it to Dow, and he began to revise it. She had not yet started working on the other filings. Dow returned the petition for a writ of prohibition to Lagarda at 4:00 p.m., and she completed the document by 4:45 p.m.
39. Meanwhile, Wiercioch was working on the *Atkins* claim, and he filed a motion with the United States Supreme Court. He then offered to assist on the lethal injection claim that TDS was preparing on behalf of Richard.
40. TDS had computer and/or e-mail problems that it anticipated would prevent them from filing with the TCCA by 5:00 p.m.
41. At approximately 4:40 p.m., on September 25, 2007 Dorinda Fox ("Fox") of TDS called the TCCA deputy clerk, Abel Acosta ("Acosta"), and told Acosta that TDS wanted to file

something, that it was running late and would like to file late. Acosta told Fox that he would need to check with someone.

42. Immediately after speaking with Fox, Acosta called Marty and told him of the telephone call from Fox. According to Marty, Acosta said, "[t]hey were having trouble getting it and want[ed] the Court to stay open late."
43. Marty did not then know that the TCCA's Execution-day Procedures required that all communications regarding the scheduled execution must be first referred to the assigned judge.
44. In response to Acosta's call, Marty called Judge Keller at her home at about 4:45 p.m. on September 25, 2007 looking for direction. Marty recalled telling Judge Keller that a representative of Richard's legal team had asked to keep the Court open past 5:00 p.m. Marty thought that Judge Keller might say "yes," or at least something other than "no," but Judge Keller said "no." She then asked, "Why?" Marty explained that they wanted to file something, but they were not ready. "They were having trouble getting it," he said. Judge Keller again responded "no." She said, "We close at 5:00 p.m."
45. Based on Judge Keller's reply, Marty told Acosta (i) that the Presiding Judge said we close at 5:00 p.m. and (ii) that the Court wasn't going to accept something after 5:00 p.m.
46. Acosta called Fox of TDS at approximately 4:48 p.m. on September 25, 2007 and told her that he had been told to tell her, "We close at 5:00 p.m." Fox of TDS asked Acosta if she could take the filing to the Court and drop it with a security guard. Acosta replied he did not know what good that would do because a security guard would not accept it.
47. At about 5:07 p.m., on September 25, 2007 Melissa Waters ("Waters") of TDS called Acosta to make sure that TDS understood his message. She asked Acosta to confirm whether the Court would not accept a late filing, as it had done so on previous occasions. She also asked him if TDS could e-mail or fax the filing to the TCCA.
48. Acosta told Waters that the decision had already been made not to accept a filing after 5:00 p.m. He also said that fax or e-mail filings would not be permitted.
49. Acosta regularly works at the clerk's office from 8:30 a.m. until 5:30 p.m. On September 25, 2007, he planned to and did stay in the clerk's office until 7:00 p.m. He testified that if the decision had been his, he would have accepted the filing after 5:00 p.m. and that it would have caused him no hardship. Acosta believed that "the decision had been made" and that he had received instructions from Presiding Judge Keller and that he could not

act differently. He believed he could not talk to a different judge about the communication because it would have been going behind the Presiding Judge's back and would have been disloyal to her.

50. Acosta knew that a judge was assigned for the Richard execution day, but Acosta did not know of the Execution-day Procedures or of any requirement that the communication be first directed to the assigned judge. As of September 25, 2007, he had never received any training concerning the Execution-day Procedures in his 17 years at the TCCA.
51. If Acosta had been told by Marty or by Judge Keller to refer the communication immediately to Judge Johnson, the assigned judge, he would have done so.
52. At approximately 4:59 p.m. on September 25, 2007, Judge Keller called Marty from her home and asked him whether representatives for the person scheduled to be executed on that day had filed anything with the TCCA concerning the scheduled execution. Marty told Judge Keller they had not.
53. Either in the 4:45 p.m. call or the 4:59 p.m. call, on September 25, 2007, Judge Keller asked Marty why the clerk's staff should be made to remain after hours for lawyers who cannot get their work done on time.
54. The TDS did not complete the lethal injection pleadings until after 5:00 p.m., when the TCCA's clerk's office closes.
55. Fox called Acosta at approximately 5:56 p.m. on September 25, 2007 and told him that she was headed to the Court to hand-deliver the filing on behalf of Richard. Acosta told Fox, "Don't bother. We're closed." Fox also asked, either in the 4:48 p.m. or the 5:56 p.m. telephone call, whether electronic filing might be accepted, and she was told no.
56. In her telephone conversations with Marty on September 25, 2007, Judge Keller did not give Marty any guidance about the Execution-day Procedures and did not tell Marty to direct the TDS inquiries to Judge Johnson, the assigned judge. Instead, Judge Keller addressed and disposed of the communications from TDS. Both Acosta and Marty understood and treated Judge Keller's responses to be her decision and their marching orders. Hence, Acosta told TDS that the decision not to accept a late filing had already been made.
57. Neither Judge Johnson nor the other judges who remained at the Court after 5:00 p.m. were aware on September 25, 2007, that Richard's legal team had called to ask whether

filings after 5:00 p.m. could be accepted. When Judge Johnson left the Court that evening, she was "quite surprised" that nothing had been filed.

58. If the assigned judge, Judge Johnson, had learned of the TDS communications on September 25, 2007, she would have accepted the filing.
59. At the time of her telephone conversations with Marty on September 25, 2007, Judge Keller knew and understood that Marty's calls were about the execution that was scheduled that evening.
60. At the time of her telephone conversations with Marty on September 25, 2007, Judge Keller knew and understood that certiorari had been granted in *Baze* that morning.
61. At the time of her telephone conversations with Marty on September 25, 2007, Judge Keller knew and understood that the United States Supreme Court's grant of certiorari in *Baze* was for the purpose of reviewing whether Kentucky's lethal injection protocol violated the "cruel and unusual punishment" clause of the United States Constitution.
62. At the time of her telephone conversations with Marty on September 25, 2007, Judge Keller knew and understood that Texas' method of execution used a lethal injection protocol and that a decision in *Baze* could have an impact on executions in Texas.
63. At the time of her telephone conversations with Marty on September 25, 2007, Judge Keller knew and understood that the person scheduled to be executed that evening was likely to attempt to file a motion to prevent the execution based on the issue in *Baze*, as had been brought to her attention in the 2:40 p.m. e-mail from Marty; and she knew that she therefore might be called upon later that day to vote whether to grant or deny relief in the event any motions were filed.
64. At the time of her telephone conversations with Marty on September 25, 2007, Judge Keller knew and understood that representatives for the person scheduled to be executed that evening wanted to file something with the TCCA.
65. At the time of her telephone conversations with Marty on September 25, 2007, Judge Keller knew and understood that the representatives for the person scheduled to be executed that evening were not ready to file with the TCCA by 5:00 p.m.
66. At the time of her telephone conversations with Marty on September 25, 2007, Judge Keller knew and understood that the representatives for the person scheduled to be

executed that evening had requested that they be permitted to file with the TCCA after 5:00 p.m.

67. At the time of her telephone conversations with Marty on September 25, 2007, Judge Keller knew and understood that the Execution-day Procedures called for the assigned judge to remain available after hours to receive last-minute communications regarding the scheduled execution.
68. At the time of her telephone conversations with Marty on September 25, 2007, Judge Keller knew that she was not the assigned judge in charge of that evening's scheduled execution, that a specific judge was the assigned judge, and that under the TCCA Execution-day Procedures, all communications relating to the scheduled execution that evening were required to be first referred to the assigned judge.
69. At the time of her telephone conversations with Marty on September 25, 2007, Judge Keller did not know whether Acosta or Marty did, or did not, know applicable requirements under the Execution-day Procedures. She knew that she had never given training to either of them concerning the Execution-day Procedures, and she was unaware of their having received training from any other source.
70. On September 25, 2007, Judge Keller did not tell Marty to direct the communications to the assigned judge.
71. On September 25, 2007, Judge Keller's duties of office required her to abide by the Execution-day Procedures.
72. Judge Keller testified that, if she were asked the same questions she was asked on September 25, 2007, and knowing the same things she knew on September 25, 2007, she would do nothing differently today.
73. At approximately 6:10 p.m., on September 25, 2007, TDS faxed a motion to stay Richard's execution to the United States Supreme Court.
74. At approximately 6:22 p.m., on September 25, 2007, Marty called Judge Keller and described to her several activities, including the late effort at or about 5:57 p.m. to file papers on Richard's behalf in the Harris County district courts, the efforts on Richard's behalf to achieve relief in the United States Supreme Court, and the fact that Richard had not yet been executed. As was the case with Judge Keller's 4:45 p.m. and 4:59 p.m. communications with Marty, she did not insist that he comply with the Execution-day Procedures during the 6:22 p.m. call.

75. On September 25, 2007, the United States Supreme Court denied Richard's motion to stay as stated in a fax at 8:01 p.m.
76. The failure of the TCCA to consider and rule on Richard's application for relief on September 25, 2007, compromised his counsel's efforts in seeking a stay of execution on behalf of Richard from the United States Supreme Court.
77. Richard was executed by the State of Texas by lethal injection at 8:23 p.m. on September 25, 2007.
78. At 8:30 p.m. on September 25, 2007, Marty called Judge Keller to inform her that Richard had been executed.
79. The next morning, September 26, 2007, Judge Keller and the other TCCA judges met for a conference. At the end of the conference, several of the judges discussed their surprise that Richard's lawyers had not filed anything with the TCCA based on *Baze*.
80. During the September 26, 2007 conference, Judge Cochran, who was not yet aware of Marty's communications with Judge Keller the night before, posed a hypothetical in which someone called the TCCA before 5:00 p.m., said they wanted to file something, but could not get it there before 5:00 p.m. Judge Cochran's position was that the TCCA should allow the late filing. Other judges expressed agreement with that viewpoint.
81. Judge Keller was present for that discussion at the September 26, 2007 conference but did not disclose to the other judges her communications with Marty the night before, nor the fact that TDS had called the TCCA concerning requests to file after 5:00 p.m.
82. Two days after Richard's execution, the United States Supreme Court granted a stay in the Carlton Turner execution, which was scheduled to take place in Texas on September 27, 2007. Turner had filed a motion for stay with the TCCA, which was denied. Although the TCCA denied the motion for stay, Turner's filing with the TCCA made him eligible to seek a stay from the United States Supreme Court. At approximately 10:00 p.m. on the night of Turner's scheduled execution, the Supreme Court granted the stay. Turner's stay was based on the same *Baze* claim that Richard was not able to present to the TCCA on September 25, 2007.
83. On October 2, 2007, the TCCA granted a stay in the Heriberto Chi execution, which was scheduled at 6:00 p.m. on October 3, 2007. Chi's stay was based on the exact same *Baze* claim that Richard was not able to present to the TCCA on September 25, 2007.

84. In April 2008, the United States Supreme Court issued an opinion in *Baze*, ruling that Kentucky's method of lethal injection was constitutional under the Eighth Amendment to the United States Constitution.
85. Between the time that the United States Supreme Court granted certiorari in *Baze* on September 25, 2007 and the time that the United States Supreme Court issued its opinion in *Baze* in April 2008, Richard was the only person in the United States to be executed.
86. Journalists throughout Texas and the nation strongly criticized Judge Keller's conduct in the *Richard* case on September 25, 2007, as casting public discredit on Judge Keller, the judiciary, and the administration of justice.
87. Numerous complaints were received by the Texas Commission on Judicial Conduct asserting that Judge Keller's conduct in the *Richard* case on September 25, 2007 cast public discredit on the administration of justice in Texas and predominantly asking that Judge Keller be sanctioned or removed from office.
88. Judges of the TCCA received numerous letters and e-mails relating to Judge Keller's conduct in the *Richard* case on September 25, 2007, predominantly asserting that Judge Keller be sanctioned or removed from office.
89. Relatives of Richard filed a civil lawsuit against Judge Keller in Federal court. Judge Keller obtained a dismissal of that civil lawsuit. Part of Judge Keller's defense was based upon the doctrine of judicial immunity. Judge Keller stated in her pleadings that she "is entitled to judicial immunity" (i) "[b]ecause the grant or denial of a stay is a judicial act, not an administrative one," and (ii) the TDS communication that had been brought to her attention on September 25, 2007 "effectively was an oral request for a stay of execution."
90. As a Judge of the TCCA, Judge Keller was required to abide by the TCCA's Execution-day Procedures on September 25, 2007.
91. Judge Keller knew on September 25, 2007 that the TCCA Execution-day Procedures required all communications regarding the scheduled execution to be first referred to the assigned judge.
92. Marty's telephone call to Judge Keller at 4:45 p.m. on September 25, 2007 was regarding the scheduled execution that evening.

93. Judge Keller intentionally did not refer Marty's 4:45 p.m. communication regarding the scheduled execution to the assigned judge.
94. Judge Keller's addressing and disposing of the September 25, 2007 communications as described above failed to comply with the Execution-day Procedures.
95. Judge Keller's addressing and disposing of the September 25, 2007 communications as described above interfered with Richard's access to court and right to a hearing as required by law under TRAP 9.2(a).
96. Judge Keller's addressing and disposing of the September 25, 2007 communications as described above was a failure to accord Richard access to court and right to a hearing as required by law under TRAP 9.2(a).
97. On September 25, 2007, Marty was part of the TCCA court personnel, responsible to all nine judges. He was subject to Judge Keller's direction and control. Marty looked to Judge Keller as his supervisor, as the person to whom he had immediate reporting responsibilities, and as the person he would approach for direction, guidance, or interpretation of a rule.
98. On September 25, 2007, Acosta was part of the TCCA court personnel, responsible to all nine judges. He was subject to Judge Keller's direction and control.
99. Marty was seeking direction from Judge Keller at 4:45 p.m. on September 25, 2007 regarding the request from representatives for the person scheduled to be executed that evening to file with the TCCA after 5:00 p.m.
100. On September 25, 2007, Judge Keller intentionally did not direct Marty to relay the 4:45 p.m. communication to the assigned judge.
101. On September 25, 2007, Judge Keller intentionally did not direct Acosta to relay the 4:45 p.m. communication to the assigned judge.
102. Judge Keller's failure to direct Marty or Acosta to relay the 4:45 p.m. communication to the assigned judge on September 25, 2007, as stated above, failed to require or assure that staff subject to her direction and control complied with the Execution-day Procedures on September 25, 2007.

103. By failing to require or assure that staff subject to her direction and control complied with the Execution-day Procedures on September 25, 2007, Judge Keller interfered with Richard's access to court and right to a hearing as required by law under TRAP 9.2(a).
104. By failing to require or assure that staff subject to her direction and control complied with the Execution-day Procedures on September 25, 2007, Judge Keller failed to require that staff subject to her direction and control accord Richard access to court and right to a hearing as required by law under TRAP 9.2(a).
105. Judge Keller knew that Marty's communications at 4:45 p.m. on September 25, 2007 related to a request by representatives for the person scheduled to be executed that evening to file with the TCCA after 5:00 p.m.
106. At the time of her communications with Marty at 4:45 p.m. on September 25, 2007, Judge Keller knew that representatives for the person scheduled to be executed that evening wanted to file with the TCCA, but were not ready to file with the TCCA by 5:00 p.m.
107. At the time of her communication with Marty at 4:45 p.m. on September 25, 2007, Judge Keller was unaware as to the reason representatives for the person scheduled to be executed that evening were not ready to file with the TCCA by 5:00 p.m.
108. Judge Keller's first response of "no" to Marty's telephone call at 4:45 p.m. on September 25, 2007 was intentional conduct to close the clerk's office promptly at 5:00 p.m. without referring the matter to the assigned judge.
109. Judge Keller's first response of "no" to Marty's telephone call at 4:45 p.m. on September 25, 2007 was intentional conduct for the clerk's office not to accept a filing after 5:00 p.m. for an execution that was scheduled at 6:00 p.m. that same evening without referring the matter to the assigned judge.
110. Judge Keller's first response of "no" to Marty's telephone call at 4:45 p.m. on September 25, 2007 was intentional conduct not to accommodate the request from representatives for the person scheduled to be executed that evening to make their filing after 5:00 p.m. without referring the matter to the assigned judge.
111. Judge Keller's second response of "no" to Marty's explanation - - that lawyers for the person scheduled to be executed that evening wanted to file something - - was intentional conduct for the clerk's office not to accept a filing after 5:00 p.m. for an execution that

was scheduled at 6:00 p.m. that same evening without referring the matter to the assigned judge.

112. Judge Keller's second response of "no" to Marty's explanation - - that lawyers for the person scheduled to be executed that evening wanted to file something but were not ready - - was intentional conduct for the clerk's office not to accept a filing after 5:00 p.m. for an execution that was scheduled at 6:00 p.m. that same evening.
113. Judge Keller's second response of "no" to Marty's explanation - - that lawyers for the person scheduled to be executed that evening wanted to file something - but were not ready - - was intentional conduct to deny the request from representatives for the person scheduled to be executed that evening to make their filing after 5:00 p.m. without referring the matter to the assigned judge.
114. Judge Keller's call to Marty at 4:59 p.m. on September 25, 2007 was willful or persistent conduct to assure closing of the clerk's office promptly at 5:00 p.m. without referring the matter to the assigned judge.
115. Judge Keller's call to Marty at 4:59 p.m. on September 25, 2007 was willful or persistent conduct that the clerk's office not accept a filing after 5:00 p.m. for an execution that was scheduled at 6:00 p.m. without referring the matter to the assigned judge.
116. Judge Keller's call to Marty at 4:59 p.m. on September 25, 2007 was willful or persistent conduct not to accommodate the request from representatives for the person scheduled to be executed that evening to make their filing after 5:00 p.m.
117. Judge Keller's conduct on September 25, 2007, interfered with Richard's and his counsel's opportunity to be heard by the judge assigned to Richard's execution under the TCCA's Execution-day Procedures.
118. On September 25, 2007, Judge Keller gave instructions to Marty that had the effect of closing any further access by Richard's lawyers to the TCCA concerning the effort to obtain a stay of Richard's execution based on the legal issue for which the United States Supreme Court had granted certiorari that day.
119. The failure of the TCCA to consider and rule on Richard's Stay of Execution on September 25, 2007 compromised Richard's counsel's efforts in seeking a stay of execution from the United States Supreme Court.

RELEVANT STANDARDS

1. Article 5, sec. 1-a(6)A of the Texas Constitution provides, in relevant part, that any justice or judge of the courts established by the Constitution or created by the Legislature may be removed from office for "incompetence in performing the duties of the office, willful violation of the Code of Judicial Conduct, or willful or persistent conduct that is clearly inconsistent with the proper performance of his duties or casts public discredit upon the judiciary or administration of justice. Any person holding such office may be disciplined or censured, in lieu of removal from office, as provided by this section. . . ."
2. Article 5, sec. 1-a(8) of the Texas Constitution provides the Commission's authority to take appropriate action upon a finding of judicial misconduct.
3. Rule 10(m) of the Procedural Rules for the Removal or Retirement of Judges, promulgated by Order of the Supreme Court of Texas pursuant to its authority under Article 5, sec. 1-a(11) of the Texas Constitution, provides: "If, after hearing, upon considering the record and report of the special master, the Commission finds good cause therefore, by affirmative vote of six of its members, it shall recommend to the Review Tribunal the removal, or retirement, as the case may be; or in the alternative, the Commission may dismiss the case or publicly order a censure, reprimand, warning, or admonition. Six votes are required for a recommendation of removal or retirement."
4. Section 33.001(b) of the Texas Government Code defines "willful or persistent conduct that is clearly inconsistent with the proper performance of a judge's duties" as, among other things: "(1) willful, persistent, and unjustifiable failure to timely execute the business of the court, considering the quantity and complexity of the business; (2) willful violation of a provision of the Texas penal statutes or the Code of Judicial Conduct; (3) persistent or willful violation of the rules promulgated by the supreme court; . . ."
5. Canon 3B(8) of the Texas Code of Judicial Conduct requires that a judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall require compliance with this subsection by court personnel subject to the judge's direction and control.
6. Canon 3C(1) of the Texas Code of Judicial Conduct requires that a judge . . . should cooperate with other judges and court officials in the administration of court business.
7. Canon 3C(2) of the Texas Code of Judicial Conduct requires that a judge should require staff, court officials and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge . . . in the performance of their official duties.

8. Canon 8B(1) of the Texas Code of Judicial Conduct defines "shall" as used in the Code as denoting "binding obligations the violation of which can result in disciplinary action."
9. Canon 8B(2) of the Texas Code of Judicial Conduct defines "should" as used in the Code as "relat[ing] to aspirational goals and as a statement of what is or is not appropriate conduct but not as a binding rule under which a judge may be disciplined."

CONCLUSIONS REGARDING BINDING OBLIGATIONS

1. Judge Keller's failure to follow Texas Court of Criminal Appeals' Execution-day Procedures on September 25, 2007, and failure to require or assure compliance by the Court of Criminal Appeals General Counsel and clerk staff with respect to Richard's right to be heard, constitutes willful or persistent conduct that is clearly inconsistent with the proper performance of her duties as a judge of the Court of Criminal Appeals and as the Presiding Judge, in violation of the standards set forth in (i) Article 5, sec. 1-a(6)A of the Texas Constitution, (ii) section 33.001(b) of the Texas Government Code, and (iii) Canon 3B(8) of the Texas Code of Judicial Conduct.
2. Judge Keller's failure to follow Texas Court of Criminal Appeals' Execution-day Procedures on September 25, 2007, and failure to require or assure compliance by the Court of Criminal Appeals General Counsel and clerk staff with respect to Richard's right to be heard, constitutes willful or persistent conduct that casts public discredit on the judiciary or the administration of justice, in violation of the standards set forth in (i) Article 5, sec. 1-a(6)A of the Texas Constitution, (ii) section 33.001(b) of the Texas Government Code, and (iii) Canon 3B(8) of the Texas Code of Judicial Conduct.
3. Judge Keller's conduct on September 25, 2007, did not accord Richard access to open courts or the right to be heard according to law. Judge Keller's conduct constitutes willful or persistent conduct that is clearly inconsistent with the proper performance of her duties as a judge of the Court of Criminal Appeals and as the Presiding Judge, in violation of the standards set forth in (i) Article 5, sec. 1-a(6)A of the Texas Constitution, (ii) section 33.001(b) of the Texas Government Code, and (iii) Canon 3B(8) of the Texas Code of Judicial Conduct.
4. Judge Keller's conduct on September 25, 2007, did not accord Richard access to open courts or the right to be heard according to law. Judge Keller's conduct constitutes willful or persistent conduct that casts public discredit on the judiciary or the administration of justice, in violation of the standards set forth in (i) Article 5, sec. 1-a(6)A of the Texas Constitution, (ii) section 33.001(b) of the Texas Government Code, and (iii) Canon 3B(8) of the Texas Code of Judicial Conduct.

CONCLUSIONS REGARDING ASPIRATIONAL GOALS

1. Judge Keller's conduct on September 25, 2007 demonstrated a failure to cooperate with other judges and court officials in the administration of court business, contrary to the aspirational goals set forth in Canon 3C(1) of the Texas Code of Judicial Conduct.
2. Judge Keller's conduct on September 25, 2007 demonstrated a failure to require court staff under her direction and control to observe the standards of fidelity and diligence that apply to herself, contrary to the aspirational goals set forth in Canon 3C(2) of the Texas Code of Judicial Conduct.

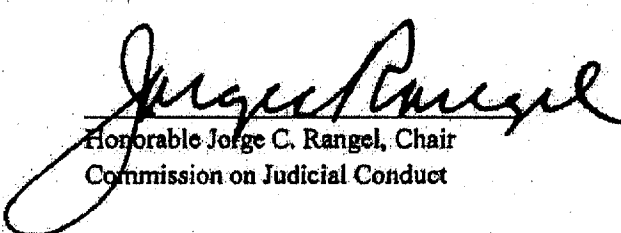
In condemnation of the conduct described above that violated Article 5, sec. 1-a(6)A of the Texas Constitution and Canon 3B(8) of the Texas Code of Judicial Conduct, it is the Commission's decision to issue a PUBLIC WARNING to the Honorable Sharon Keller, Presiding Judge of the Texas Court of Criminal Appeals, Austin, Travis County, Texas.

Pursuant to the authority contained in Article 5, sec. 1-a(8) of the Texas Constitution, it is ordered that Judge Keller's conduct described above be made the subject of a PUBLIC WARNING by the State Commission on Judicial Conduct.

Finally, the Commission reiterates the importance of the goals denoted in Canons 3C(1) & (2) of the Texas Code of Judicial Conduct. While aspirational in application (see Canon 8B(2) of the Texas Code of Judicial Conduct), these Canons convey a need for open communication, congeniality, and collegiality that are especially important to the function of the State's appellate courts, and the TCCA in particular. The Commission strongly urges that Judge Keller and all the judges of the TCCA reflect on the importance of achieving the goals stated therein.

The Commission takes this action in a continuing effort to protect public confidence in the judicial system, and to assist the state judiciary in its efforts to embody the principles and values set forth in the Texas Constitution and the Code of Judicial Conduct.

Issued this 16th day of July, 2010.


Honorable Jorge C. Rangel, Chair
Commission on Judicial Conduct

Appendix B

TEXAS LAWYER

MICHAEL ESSNER ASKS 5TH CIRCUIT TO FREE HIM FROM STANFORD CRIMINAL CASE

by BRENDA SAPINO JEFFREYS

RAllen Stanford may be having a tough time of it in federal detention while preparing for his criminal trial, but it has not been a bed of roses lately for his two criminal-defense lawyers, either.

One of Stanford's counsel, Houston lawyer Michael Essner, faces a dilemma. On July 9, Senior U.S. District Judge David Hittner denied Essner and his firm's second request to withdraw from the case, even though Stanford terminated Essner's representation in May. On July 13, Essner and his firm, Essner, Trifiro & Rainey, appealed

Hittner's order to the 5th U.S. Circuit Court of Appeals, but in the meantime Essner says he continues to stay up-to-date on the case.

"All I've been doing is trying to keep up with it, to monitor the flow [of pleadings] if I have to go back to work on it," says Essner, managing partner in Essner, Trifiro & Rainey.

Robert S. Bennett of Houston, now Stanford's lead defense attorney, is dealing with an ongoing personal Chapter 7 bankruptcy.

On July 8, Houston attorney Robbie Bayless of Bayless & Sobies was an auction for The Bennett Law Firm

with a \$28,500 bid. Bayless represents a creditor of The Bennett Law Firm.

Bennett says the bankruptcy, Robert S. Bennett, Debtor, isn't interfering with his work for Stanford. Bennett formed a joint venture, Bennett Nguyen Joint Venture in Houston, for the Stanford representation.

Stanford, the jettisoned former chairman of Houston-based Stanford Financial Group (SFG), has pleaded not guilty to fraud and conspiracy charges related to an alleged conspiracy to defraud investors who bought about \$7 billion in certificates of deposit sold through

► see Essner, page 16

Bad Law?



"I'm not criticizing the commission for what they did, but I don't entirely stand with them and what they did," Susan Willing says.

Judicial Conduct Commission Examiner Questions Basis for Public Warning in Keller Case

by MARY ALICE ROBBINS

Iustices are being raised about the State Commission on Judicial Conduct's July 16 public warning of Court of Criminal Appeals Presiding Judge Sharon Keller. The order concerned her conduct on the day the state executed Michael Richard.

Susan Willing, the commission's examiner, contends in an e-mail that the order is based on a rule that does not comport with the Texas Constitution. As examiner in judicial misconduct cases, Willing acts as a prosecutor does in a criminal case, gathering and presenting evidence, often assisted by a private attorney.

Willing says, "I'm not criticizing the commission for what they did, but I don't understand why they did what they did." But Willing is concerned that the commission's public warning in Keller could result in "bad law" and cost taxpayers more money.

She argues the commission should have based its order on the constitution, which allows the commission only three options after it begins formal proceedings against a judge and after a special master issues a report: issue

► see Commission, page 16

STRASBURGER, PARTNER HIT WITH \$170,156 VERDICT

by BRENDA SAPINO JEFFREYS

A jury in Fort Worth returned a verdict on July 20 awarding three members of the Blackmon family — of the Blackmon Mourning company — \$170,156 in actual damages in a breach-of-contract suit they filed against Strasburger & Price and partner Charles M. Hoesch.

The jury in *Kirk Blackmon, et al. v. Strasburger & Price, et al.*, filed in the 133rd District Court in Tarrant County, found Strasburger & Price and Hoesch failed to comply with an agreement they made with brothers Kirk, William and Gregory Blackmon to arbitrate disputes involving the plaintiffs and to render an award. Visiting Judge Dixon Holman, a former 2nd Court of Appeals justice, presided over the trial.

The verdict came nearly a year after the firm and Hoesch had resolved, under confidential terms, a related suit filed by Scott W. Mouring, who was a former partner with the Blackmons in Fort Worth's Blackmon Mouring. In his 2009 second amended petition in *Scott W. Mouring v. Strasburger & Price et al.*, Mouring had alleged Hoesch, an arbitrator, never issued a decision following an arbitre-

► see Jury, page 16

COMMISSION EXAMINER QUESTIONS BASIS FOR PUBLIC WARNING IN KELLER

Continued from page 1

a censure, recommended removal or retirement, or disbar the lawyer.

But John J. "Alber" McKenna, the special counsel who presented Keller, thinks the constitution allows the commission to take the action it felt.

Bob Wierman, the commission's counsel in Keller, says the commission's position is that the order "speaks for itself." He declines further comment.

In the Order of Public Warning in *Aggravated Assault on a Peace Officer*, the commission found that Keller's conduct on Sept. 25, 2007, failed to accord Richard "access to open courts or the right to be heard according to law."

The commission made the following findings of fact in its order: Keller "began to yell" when asked whether the CCA clerk's office would remain open past 5 p.m. that day; Keller "began to yell" when asked about keeping the clerk's office open that representatives of the person arrested for execution that evening were not ready to file by 5 p.m.; Texas Defender Service attorneys representing Richard were trying to file a stay of execution and with representation with the CCA in connection with the U.S. Supreme Court's decision earlier that day to consider a lethal injection case from Kentucky; Richard's attorneys did not get the documents filed at the CCA, a prerequisite to seeking a stay from the state's high court, and the state executed Richard later that day.

The judicial conduct commission initiated formal proceedings against Keller in February 2009 and brought the charges against him, alleging, among other things, that Keller committed misconduct when she failed to follow the CCA's execution-day protocol and that her conduct casts discredit on the judiciary. Judge David Berchensman Jr. of the 57th District Court, the special master in Keller, presided over the August 2009 hearing in the case.

In his January report to the commission, Berchensman found that Keller did not break any law, rule or canon of judicial conduct. Berchensman also found that Keller's conduct "does not warrant removal from office, or even further reprimand beyond the public warning she has already suffered."

But the commission did not follow Berchensman's recommendation, instead issuing Keller a public warning.

Willing, who also is the commission's executive director, argues the commission based its order on a tribe that provides a larger range of possible sanctions than the constitution does. As proof that the rule does not comport with constitutional requirements, she points to a discrepancy between it and a constitutional provision regarding the number of commission votes needed to form a majority. She also notes that the rule is inconsistent with the Texas Government Code.

Understanding the controversy requires reading the language of the rule on which the commission based its order and of the constitutional provision.

In the Relevant Standards section of its July 16 order, the commission cited Texas Constitution Article 5, §1-a(9), which provides, in part, that any justice or judge of the courts established by the Constitution or created by the Legislature "may be disciplined or censured, in lieu of removal from office, as provided by this section...."

The order cited Article 5, §1-a(9) for the commission's authority "to take appropriate action upon a finding of judicial misconduct."

Not quoted in the order is the language in Article 5, §1-a(9), which provides that after the commission initiates formal proceedings against a judge and after a special master hears evidence and issues a report, the commission, if it finds good cause, "shall issue an order of public censure or it shall recommend to a review panel the removal or retirement of the judge."

The order also cited Rule 10(a) of the Procedural Rules for the Removal or Retirement of Judges, which governs the commission's vote in formal proceedings. That rule reads in part:

"If, after hearing, upon considering the record and report of the special master, the Commission finds good cause, therefore, by affirmative vote of six of its members,

it shall recommend to the Review Tribunal the removal or retirement, as the case may be, or in the alternative, the commission may demand the case or publicly order censure, reprimand, warning, or admonition."

The rule, which was promulgated by the Texas Supreme Court, gives the commission more options for sanctions than Willing believes the constitution allows.

The rule allows removal, retirement, censure and the usual but also reprimand, warning or admonition. A canon of the highest sanction that the commission can have, short of recommending a judge's removal or retirement, a public reprimand is a higher sanction than a public warning, a public warning is a milder sanction, and an admonition is the lowest public sanction.

According to Willing's counsel, Rule 10(a) is inconsistent with Texas Constitution Article 5, §1-a(9). In Willing's view, the constitution controls.



John J. "Alber" McKenna, the special counsel who presented Keller, argues the commission is using the statute it did.

McKenna, the special counsel in Keller, believes the commission's language permits the sanction the commission issued. He says Article 5, §1-a(9) also includes language authorizing the commission to issue a public sanction, warning, reprimand or retirement that the judge obtain additional training or education after it investigates a judge.

But the commission's issuance of the public warning in Keller occurred after it opened formal proceedings, not after the investigation.

McKenna, a shareholder in Austin's Gurnea Dougherty Heaton & Moody, says it doesn't make sense that the commission would have fewer potential options after formal proceedings than it does otherwise.

"It would be unfortunate if they had only the options of removal or censure after formal proceedings," McKenna says. But the question remains whether the initiation of formal proceedings is a key distinction in determining what options the commission has.

Willing contends in her e-mail that the fact that the commission has never issued a sanction other than a censure following a formal proceeding, even by agreement, "indicates that Rule 10(a) is not good authority for anything."

Other findings

Another issue is the notice to a judge of what sanctions he or she could face. Houston web site *Flatten the Deck*, a judicial conduct expert, says the commission's annual report before and after the adoption of Rule 10(a) — including the 2009 report posted on the commission's website — feature charts showing that the options after the commission opens formal proceedings are to discipline the changes, issue an order of public censure, or recommend the removal or retirement of the judge.

"I don't see how it's giving notice to judges of anything other than that, including a public warning," Hardwick says.

As further proof that the commission should not have based its order on the rule, Willing argues the rule is not up to date with the constitution's requirements.

State Supreme Court Justice Nathan Hecht says the court adopted Rule 10(a) in 1992. Hecht is the only current member of the Supreme Court who also was on the court when the rule was adopted.

The rule was not updated to reflect changes after a 2005 constitutional amendment increased the number of commission members from 11 to 13.

Twice in its July 16 order of public warning, the commission quotes the Rule 10(a) requirement that there be an affirmative vote for a sanction or recommendation to remove a judge. The 2005 amendment increased the number of votes from six to seven for such action.

However, the commission did not disclose the vote split in Keller's case.

In addition to being out of sync with the constitution, Willing argues the rule is inconsistent with Texas Government Code Chapter 33, the statute that governs the judicial conduct commission. Government Code §33.001 defines "formal proceedings" to mean "the proceedings ordered by the commission concerning the public censure, removal, or retirement of a judge."

Willing believes the commission's public warning in Keller could result in bad law. She says judges have resigned in lieu of discipline after the commission began formal proceedings against them. But now, judges might not agree to accept resignation if they are facing a lesser sanction.

Richard's lawyer

Charles "Ogie" Babcock, Keller's attorney and a Jackson Walker partner in Dallas and Houston, isn't weighing in on Willing's criticism, but he says, "We are definitely going to challenge the order of the commission."

Babcock says, "This has never happened where the commission has initiated a formal proceeding, the trial judge has recommended no sanction and the commission has issued a public warning."

While Babcock is discussing an appeal, how such an appeal would proceed is unclear. That's because there are different procedures for appeals after formal and informal proceedings. A public warning typically follows informal proceedings, but in Keller's case, the commission issued a public warning after formal proceedings.

When the commission issues a public warning to a judge in informal proceedings, that judge has the right to ask the state Supreme Court to appoint three appellate justices to a special court of review to hear the appeal. Willing says in an earlier view that in such appeals, the three-judge panel reviews the evidence de novo, according to a new trial.

But because the commission initiated formal proceedings against Keller, Keller already has had a trial — before the special master. Willing says a new trial would be a waste of resources. She is concerned about Keller getting what amounts to a second trial on the lawyer's dime.

"This is lawyers' resources being expended for a second trial," Willing says. "I have a problem with that."

Willing says that even though the commission does not pay Gurnea Dougherty legal fees for McKenna's work as special counsel, it had to pay for the firm expenses in Keller, which totaled about \$201,000 so far. "Are we going to have to do that again?" Willing asks.

Regardless of what happens in the courts, one member of the Texas House of Representatives is considering seeking Keller's impeachment. State Rep. Lou Barman, D-Port Worth, says, "If that's all on the bench in January, it's likely an impeachment resolution will be filed again." **ELLEN**

Mary Alice Robbins' e-mail address is maryalices@tulsanews.com. She is on Twitter at www.twitter.com/maryalices.

Appendix C



State Commission on Judicial Conduct

FILED

Clerk of the Commission

BEFORE THE

STATE COMMISSION ON JUDICIAL CONDUCT

Date 2/19/09 In Re Judge No. 96
By Clarice Thompson

INQUIRY CONCERNING A JUDGE,

No. 96

FILE STAMPED COPY

By et Date 2/19/09
Clerk of the Commission
State Commission on Judicial Conduct

NOTICE OF FORMAL PROCEEDINGS

TO THE HONORABLE SHARON KELLER, PRESIDING JUDGE OF THE TEXAS COURT OF CRIMINAL APPEALS, AUSTIN, TRAVIS COUNTY, TEXAS:

Pursuant to Section 33.022 of the Texas Government Code and Rule 10 of the Procedural Rules for the Removal or Retirement of Judges, as promulgated by the Texas Supreme Court, this NOTICE is hereby given to the Honorable Sharon Keller, Presiding Judge of the Texas Court of Criminal Appeals, that formal proceedings have been instituted against her, based upon the following:

FACTUAL ALLEGATIONS

1. At all times relevant hereto, the Honorable Judge Sharon Keller has been the Presiding Judge of the Texas Court of Criminal Appeals ("CCA").
2. Judge Keller was elected to the CCA in 1994. In 2000 she was elected Presiding Judge, and in 2006 she was re-elected for another six year term.
3. The CCA's Execution-day Procedures provide as follows:

A designated judge will be assigned to be in charge of each scheduled execution....

All communications regarding the scheduled execution shall be first referred to the assigned judge. The term "communications" includes pleadings, telephone calls, faxes, e-mails, and any other means of communication with the Court. The assigned judge may call a special conference or gather votes by telephone, e-mail, fax, or other form of communication.

If the communication includes a request for stay of execution, the assigned judge shall contact, by any reasonable means, the other members of the court and request a vote on the motion to stay. Non-assigned judges will provide to the assigned judge an adequate means of contact. "Reasonable

means" includes calling a special conference and contact by electronic communication.

4. The CCA Execution-day Procedures were unwritten until November 2007, when they were put in writing. Judge Keller has acknowledged that these procedures were in effect at all dates relevant to this proceeding and that she was familiar with them.
5. On September 25, 2007, Michael Wayne Richard was scheduled to be executed by the State of Texas. All of the CCA judges, including Judge Keller, were aware that September 25, 2007, was an execution date and that Mr. Richard was scheduled to be executed at 6 p.m. that evening.
6. At approximately 9 a.m. on September 25, 2007, the United States Supreme Court ("USSC") announced that it would hear oral arguments in *Baze v. Rees* ("*Baze*") to consider whether the method of lethal injection execution in Kentucky constituted cruel and unusual punishment.
7. The designated judge in charge of Mr. Richard's execution was the Honorable Judge Cheryl Johnson. Judge Johnson, CCA General Counsel Edward Marty, and several other members of the Court intended to stay at the CCA after hours on September 25, 2007, until word of the execution was received.
8. At 11:29 a.m. on September 25, 2007, Mr. Marty sent an e-mail to all of the CCA judges with the subject line, "Execution Schedule." In the e-mail Mr. Marty informed the CCA judges, including Judge Keller, that, "The Supreme Court has just granted cert on two Kentucky cases in which lethal injection was claimed to be cruel and unusual . . . I do not know if Michael Wayne Richard will try to stay his execution for tonight over this issue or in what court."
9. At 1:30 p.m. the Honorable Judge Cathy Cochran forwarded the members of the CCA, including the General Counsel, Judge Keller, and the other judges, the internet link to the Kentucky Supreme Court's unanimous decision in *Baze*.
10. All the members of the CCA, including the General Counsel, Judge Keller and the other judges, were aware on September 25 of the USSC's decision that morning to grant certiorari in *Baze* and to set the case for later argument. Members of the CCA anticipated that Mr. Richard's counsel would likely make some type of filing with the CCA based on *Baze*.
11. Mr. Richard was represented by lawyers with the Texas Defender Services ("TDS"). Soon after learning of the decision on September 25 to grant certiorari in *Baze*, TDS began to work on a petition to present to the CCA requesting a stay based on the United States constitutional issue presented in *Baze*, since Texas used the same method of lethal injection as Kentucky.
12. In the early afternoon, Mr. Marty began drafting a proposed order for the Court in anticipation of Mr. Richard's appeal based on *Baze*. The Honorable Judge Tom Price

drafted a dissenting opinion in anticipation of Mr. Richard's appeal and circulated the dissent to the other judges.

13. At approximately 2:40 p.m., Mr. Marty sent an e-mail to all of the CCA judges, including Judge Keller, with the subject line, "Michael Wayne Richard update." In the e-mail, Mr. Marty informed the CCA judges that the Harris County District Attorney's Office had just called and informed him that Mr. Richard's attorneys had called the Harris County District Attorney's office and confirmed that they (Mr. Richard's lawyers) planned to file a writ of prohibition and subsequent application on behalf of Mr. Richard based on the issue in *Baze* for which certiorari had been granted that morning. Mr. Marty promised to keep the judges informed and circulate a copy of any pleadings when he received them.
14. Judge Keller left her chambers at the CCA during the afternoon on September 25, 2007, to meet a repairman at her home. Judge Keller did not return to the CCA that day.
15. TDS had computer problems that they anticipated would prevent them from filing the pleadings with the CCA by 5 p.m. At approximately 4:45 p.m., TDS called the clerk's office of the CCA and requested that it accept their filing a few minutes late. The CCA deputy clerk, Abel Acosta, told TDS that the clerk's office closed at 5 p.m., but that he would call Mr. Marty. He did so.
16. In response to Mr. Acosta's call, Mr. Marty immediately called Judge Keller at her home and asked her whether the clerk's office could stay open past 5 p.m.¹ Judge Keller said "no" and asked "Why?" Mr. Marty replied: "They wanted to file something, but they were not ready." Judge Keller again said "no."
17. Based on Judge Keller's reply, Mr. Marty directed that Mr. Acosta not accept a filing after 5:00 p.m. Mr. Acosta called TDS at approximately 4:48 p.m. and told them that the clerk's office would close promptly at 5 p.m. A TDS paralegal told Mr. Acosta that she would take the filing to the Court and drop it with a security guard. Mr. Acosta replied he did not know what good that would do because no filing would be accepted after 5 p.m. TDS called back and asked if they could e-mail or fax something to the CCA. Mr. Acosta told them that the decision had already been made not to accept a filing after 5 p.m. TDS called Mr. Acosta shortly before 6:00 p.m. and told him that they were headed to the Court to hand deliver the pleadings on behalf of Mr. Richard. Mr. Acosta told TDS not to bother, because no one was there to accept the filing.
18. At the time of her telephone conversation with Mr. Marty, Judge Keller knew and understood that (i) Mr. Marty's call was about Mr. Richard, (ii) Mr. Richard was scheduled to be executed at 6 p.m. that evening, (iii) certiorari had been granted in *Baze* that morning, (iv) a filing by Mr. Richard's lawyers based on the issue in *Baze* had been anticipated, (v) Mr. Richard's lawyers wanted to file something with the CCA, (vi) Mr. Richard's lawyers were not ready to file with the CCA by 5 p.m., and that (vii) Mr. Richard's lawyers had requested that they be permitted to file after 5 p.m. In addition,

¹ Mr. Marty recalls telling Judge Keller "they wanted the Court to stay open late," or "they want to hold the court open." Judge Keller, however, claims that Mr. Marty referred to the *clerk's* office, not the Court, and that he asked her the specific question of whether the clerk's office stayed open past 5 p.m.

Judge Keller knew that it had been common in the past to receive late pleadings on execution days after the clerk's office closed, and she knew that the Execution-day Procedures called for the designated judge to remain available after hours to receive last-minute communications regarding the scheduled execution.

19. On September 25, 2007, Judge Keller also knew that she was not the designated judge in charge of Mr. Richard's scheduled execution. Further, she knew that Judge Johnson was the designated judge and that, under the CCA Execution-day Procedures, all communications relating to the scheduled execution of Mr. Richard were required to be first referred to Judge Johnson.
20. Although Judge Keller knew that the communication relayed to her by Mr. Marty related to the scheduled execution, she disregarded the CCA's Execution-day Procedures. Her response to Mr. Marty failed to direct that he relay the communication to the designated judge, Judge Johnson, who was responsible for the handling of Mr. Richard's case and who remained present at the court after 5:00 p.m. to await any filings with the Court. Instead, Judge Keller gave instructions to Mr. Marty that had the effect of closing any further access by Mr. Richard's lawyers with the CCA concerning the effort to obtain a stay of Mr. Richard's execution based on the legal issue for which the USSC had granted certiorari that very day.
21. At approximately 5 p.m., Judge Keller called Mr. Marty from her home and asked him whether Mr. Richard's lawyers had filed anything with the CCA. Mr. Marty told Judge Keller they had not.
22. Judge Keller did not refer Mr. Marty or his inquiries to Judge Johnson, the assigned judge. Neither Judge Johnson nor the other judges who remained at the Court after 5 p.m. were aware that Mr. Richard's lawyers had called to ask whether filings after 5 p.m. could be accepted.
23. Mr. Richard was executed by the State of Texas by lethal injection at approximately 8:20 p.m. on September 25, 2007.
24. The next morning, September 26, 2007, Judge Keller and the other CCA judges met for their weekly conference. At the end of the conference, several of the judges discussed their surprise that Mr. Richard's lawyers had not filed anything with the CCA based on *Baze*. Judge Cochran, who was not yet aware of Mr. Marty's communications with Judge Keller the night before, posed a hypothetical in which someone called the clerk's office before 5 o'clock, said they wanted to file something, but could not get it there before 5 p.m. Judge Cochran's position was that the CCA should allow the late filing. Judge Keller simply responded, "The Clerk's office closes at 5 p.m.; it's not a policy, it's a fact." Judge Keller did not disclose to the other judges her communications with Mr. Marty the night before, nor the fact that Mr. Richard's lawyers had called the CCA to ask whether filings after 5 p.m. could be accepted.
25. Two days after Mr. Richard's execution, the USSC granted a stay in the Carlton Turner execution, which was scheduled to take place in Texas on September 27, 2007. Mr.

Turner had filed a motion for stay with the CCA, which was denied. Although the CCA denied the motion for stay, Mr. Turner's filing with the CCA made him eligible to seek a stay from the USSC. At approximately 10:00 p.m. on the night of Mr. Turner's scheduled execution, the USSC granted the stay. Mr. Turner's stay was based on the exact claim that Mr. Richard was not able to present to the CCA on September 25, 2007.

26. On October 2, 2007, the CCA granted a stay in the Heriberto Chi execution, which was scheduled at 6 p.m. on October 3, 2007. Mr. Chi's stay was based on the exact claim that Mr. Richard was not able to present to the CCA on September 25, 2007.
27. Following the stay by the USSC in *Baze* at 9:00 a.m. on September 25, 2007, Mr. Richard was the only person in the United States to be executed during the 6 months prior to the USSC's April 2008 decision in *Baze*, after full briefing and oral argument, that lethal injection was constitutional under the United States Constitution.
28. Journalists throughout Texas and the nation have weighed in on the Richard case, and the response has been overwhelmingly negative.

- The *Houston Chronicle* began an editorial this way: "The events of Sept. 25 have put a stain on Texas justice that can only be cleaned by the removal of Chief Justice Sharon Keller from the Texas Court of Criminal Appeals." The editorial went on to describe Judge Keller's actions as "legally inexcusable," "mind boggling," and a "miscarriage of justice."

- Describing the event as "unconscionable," an editorial in the *Dallas Morning News* concluded this way: "Hastening the death of a man, even a bad one, because office personnel couldn't be bothered to bend bureaucratic procedure was a breathtakingly petty act and evinced a relish for death that makes the blood of decent people run cold."

- An editorial in the *Austin American Statesman* said, "Keller's court has consistently failed its duty to ensure the integrity of capital trials and death sentences." Referring specifically to the Richard incident: "That cold-hearted response drew international criticism of Keller and the court." And, "it is abundantly clear that Keller and her court have been more concerned with process than justice."

- The Waco newspaper said this: "Sharon Keller, presiding judge of the Texas Court of Criminal Appeals, shamed the state by deciding that 20 minutes of her time was more important than a last minute appeal for a man on death row."

- The *Fort Worth Star-Telegram* noted that the Texas Court of Criminal Appeals under Judge Keller had been "derided" and "scolded" in the past. "But for sheer myopia, it's hard to top Keller's refusal to keep

the court open long enough to accept an emergency appeal from a Death Row inmate about to be executed."

- Michael Hall, writing for *Texas Monthly*, said this: "When a man's life is on the line – to say nothing of the U.S. Constitution – our top criminal judge should behave like one: with prudence, fairness, and a calm hand. It's time for Keller to go."

- National reporters too have taken note of the controversy. Ralph Blumenthal of the *New York Times*, commented that Judge Keller, "is the target of a rising national outcry after turning away that last appeal of a death row inmate because the rushed filing was delayed past the court's 5 p.m. closing time." In *USA Today*, Kevin Johnson wrote about the Richard case, describing the "frenzied, behind-the-scenes legal fight that led to intense criticism of Texas courts and confusion about the actions of the nation's highest court."

29. Judge Keller's current term in office expires in 2012.
30. At the time of this notice Judge Keller continues to perform judicial duties.

RELEVANT STANDARDS

1. Article 5, Section 1-a(6)A of the Texas Constitution provides, in relevant part, that any justice or judge of the courts established by the Constitution or created by the Legislature may be removed from office for "incompetence in performing the duties of office, willful violation of the Code of Judicial Conduct, or willful or persistent conduct that is clearly inconsistent with the proper performance of his duties or casts public discredit upon the judiciary or administration of justice."
2. Article 1, Section 13 of the Texas Constitution, provides, in relevant part, that "All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law."
3. Canon 2A of the Texas Code of Judicial Conduct requires that a judge shall comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
4. Cannon 3B(8) of the Texas Code of Judicial Conduct requires that a judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law.

CHARGE I

Judge Keller's willful and persistent failure to follow CCA's Execution-day Procedures on September 25, 2007, constitutes willful or persistent conduct that is clearly inconsistent with the

proper performance of her duties as Presiding Judge, in violation of the standards set forth in (i) Article 5, Section 1-a(6)A of the Texas Constitution, (ii) Canon 2A of the Texas Code of Judicial Conduct, (iii) Article 1, Section 13 of the Texas Constitution, and (iv) Cannon 3B(8) of the Texas Code of Judicial Conduct.

CHARGE II

Judge Keller's willful and persistent failure to follow CCA's Execution-day Procedures on September 25, 2007, constitutes willful or persistent conduct that casts public discredit on the judiciary or the administration of justice, in violation of the standards set forth in (i) Article 5, Section 1-a(6)A of the Texas Constitution, (ii) Canon 2A of the Texas Code of Judicial Conduct, (iii) Article 1, Section 13 of the Texas Constitution, and (iv) Cannon 3B(8) of the Texas Code of Judicial Conduct.

CHARGE III

Judge Keller's conduct on September 25, 2007, did not accord Mr. Richard access to open courts or the right to be heard according to law. Judge Keller's conduct constitutes willful or persistent conduct that is clearly inconsistent with the proper performance of her duties as Presiding Judge, in violation of the standards set forth in (i) Article 5, Section 1-a(6)A of the Texas Constitution, (ii) Canon 2A of the Texas Code of Judicial Conduct, (iii) Article 1, Section 13 of the Texas Constitution, and (iv) Cannon 3B(8) of the Texas Code of Judicial Conduct.

CHARGE IV

Judge Keller's conduct on September 25, 2007, did not accord Mr. Richard access to open courts or the right to be heard according to law. Keller's conduct constitutes willful or persistent conduct that casts public discredit on the judiciary or the administration of justice, in violation of the standards set forth in (i) Article 5, Section 1-a(6)A of the Texas Constitution, (ii) Canon 2A of the Texas Code of Judicial Conduct, (iii) Article 1, Section 13 of the Texas Constitution, and (iv) Cannon 3B(8) of the Texas Code of Judicial Conduct.

CHARGE V

Judge Keller's willful and persistent failure to follow CCA's Execution-day Procedures on September 25, 2007, constitutes incompetence in the performance of duties of office, in violation of the standards set forth in (i) Article 5, Section 1-a(6)A of the Texas Constitution, and (ii) Canon 2A of the Texas Code of Judicial Conduct.

Judge Keller is hereby notified that she has the right to file a written answer to the foregoing charges within fifteen (15) days after service of the Notice of Formal Proceedings upon her. Judge Keller's answer, which shall be verified, should be forwarded or delivered to the State Commission on Judicial Conduct, P.O. Box 12265, Austin, Texas 78711-2265.

Signed this 18th day of February, 2009

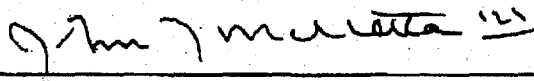
EXAMINERS:

Seana Willing
Executive Director
Texas Bar No. 00787056

SPECIAL COUNSEL

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By:



John J. McKetta III

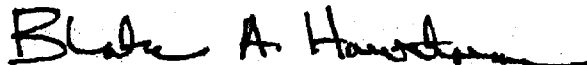
Appendix D

IN THE SUPREME COURT OF TEXAS**Misc. Docket No. 09-****9063****APPOINTMENT OF A SPECIAL MASTER REQUESTED
BY THE STATE COMMISSION ON JUDICIAL CONDUCT**

Pursuant to the provisions of Texas Constitution, Article V, sec. 1-a(6), (8), & (10), and Rules for the Removal or Retirement of Judges 10(c)(2), the Supreme Court of Texas hereby appoints the Honorable David Berchermann, Jr., Judge of the 37th Judicial District Court of Bexar County, Texas, as a Special Master to conduct a hearing concerning Judge No. 96, and to make a report thereof to the Commission.

As ordered by the Supreme Court of Texas, in chambers,

With the Seal thereof affixed at the City
Of Austin, this 9th day of April, 2009.



BLAKE A. HAWTHORNE, CLERK
SUPREME COURT OF TEXAS

Justice Nathan L. Hecht not sitting

Appendix E

COPY

**BEFORE THE
STATE COMMISSION ON JUDICIAL CONDUCT**

INQUIRY CONCERNING A JUDGE,

No. 96

FILE STAMPED COPY

By ET Date 6/15/09
Clerk of the Commission
State Commission on Judicial Conduct

FIRST AMENDED NOTICE OF FORMAL PROCEEDINGS

**TO THE HONORABLE SHARON KELLER, PRESIDING JUDGE OF THE TEXAS
COURT OF CRIMINAL APPEALS, AUSTIN, TRAVIS COUNTY, TEXAS:**

Pursuant to Section 33.022 of the Texas Government Code and Rule 10 of the Procedural Rules for the Removal or Retirement of Judges, as promulgated by the Texas Supreme Court, this FIRST AMENDED NOTICE is hereby given to the Honorable Sharon Keller, Presiding Judge of the Texas Court of Criminal Appeals, of the formal proceedings against her, based upon the following:

FACTUAL ALLEGATIONS

1. At all times relevant hereto, the Honorable Judge Sharon Keller has been the Presiding Judge of the Texas Court of Criminal Appeals ("CCA").
2. Judge Keller was elected to the CCA in 1994. In 2000 she was elected Presiding Judge, and in 2006 she was re-elected for another six year term.
3. The CCA's Execution-day Procedures provide as follows:

A designated judge will be assigned to be in charge of each scheduled execution....

All communications regarding the scheduled execution shall be first referred to the assigned judge. The term "communications" includes pleadings, telephone calls, faxes, e-mails, and any other means of communication with the Court. The assigned judge may call a special conference or gather votes by telephone, e-mail, fax, or other form of communication.

If the communication includes a request for stay of execution, the assigned judge shall contact, by any reasonable means, the other members of the court and request a vote on the motion to stay. Non-assigned judges will provide to the assigned judge an adequate means of contact. "Reasonable

means" includes calling a special conference and contact by electronic communication.

4. The CCA Execution-day Procedures were unwritten until November 2007, when they were put in writing. Judge Keller has acknowledged that these procedures were in effect at all dates relevant to this proceeding and that she was familiar with them.
5. Texas Rule of Appellate Procedure 9.2 (a) provides as follows:
 - (a) *With Whom.* A document is filed in an appellate court by delivering it to:
 - (1) the clerk of the court in which the document is to be filed; or
 - (2) a justice or judge of that court who is willing to accept delivery. A justice or judge who accepts delivery must note on the document the date and time of delivery, which will be considered the time of filing, and must promptly send it to the clerk.
6. Judge Keller has acknowledged that Rule 9.2(a) gives persons with a legal interest in a proceeding the right to be heard by the clerk or a judge as to the acceptance of a filing after hours.
7. On September 25, 2007, Michael Wayne Richard was scheduled to be executed by the State of Texas. All of the CCA judges, including Judge Keller, were aware that September 25, 2007, was an execution date. Although, Judge Keller has testified inconsistently whether she did or did not know that Mr. Richard was the person scheduled to be executed that evening, she knew that a person was scheduled to be executed at 6 p.m. that evening..
8. The designated judge in charge of Mr. Richard's execution was the Honorable Judge Cheryl Johnson. Judge Johnson, CCA General Counsel Edward Marty, and several other members of the Court intended to stay at the CCA after hours on September 25, 2007, until word of the execution was received.
9. At approximately 9 a.m. on September 25, 2007, the United States Supreme Court ("USSC") announced that it would hear oral arguments in *Baze v. Rees* ("*Baze*") to consider whether the method of lethal injection execution in Kentucky constituted cruel and unusual punishment.
10. At 11:12 a.m., Judge Keller received a copy of the *Baze* petition for certiorari, which the United States Supreme Court had granted, and a copy of the Kentucky Supreme Court decision in *Baze*.
11. At 11:29 a.m. on September 25, 2007, Mr. Marty sent an e-mail to all of the CCA judges with the subject line, "Execution Schedule." In the e-mail Mr. Marty informed the CCA judges, including Judge Keller, that, "The Supreme Court has just granted cert on two Kentucky cases in which lethal injection was claimed to be cruel and unusual . . . I do not

know if Michael Wayne Richard will try to stay his execution for tonight over this issue or in what court."

12. At 1:30 p.m. the Honorable Judge Cathy Cochran informed the members of the CCA, including the General Counsel, Judge Keller, and the other judges, of an internet link to the Kentucky Supreme Court's unanimous decision in *Baze*.
13. All the members of the CCA, including the General Counsel, Judge Keller and the other judges, were aware on September 25 of the USSC's decision that morning to grant certiorari in *Baze* and to set the case for later argument. Members of the CCA anticipated that Mr. Richard's counsel would likely make some type of filing with the CCA based on *Baze*.
14. Mr. Richard was represented by lawyers with the Texas Defender Services ("TDS"). Soon after learning of the decision on September 25 to grant certiorari in *Baze*, TDS began to work on a filing to present to the CCA requesting a stay based on the United States constitutional issue presented in *Baze*, since Texas used the same method of lethal injection as Kentucky.
15. In the early afternoon, Mr. Marty began drafting a proposed order for the Court in anticipation of Mr. Richard's filing based on *Baze*. The Honorable Judge Tom Price drafted a dissenting opinion in the event Mr. Richard's request for stay was denied, and circulated the dissent to the other judges.
16. At approximately 2:40 p.m., Mr. Marty sent an e-mail to all of the CCA judges, including Judge Keller, with the subject line, "Michael Wayne Richard update." In the e-mail, Mr. Marty informed the CCA judges that the Harris County District Attorney's Office had just called and informed him that Mr. Richard's attorneys had called the Harris County District Attorney's office and confirmed that they (Mr. Richard's lawyers) planned to file a writ of prohibition and subsequent application on behalf of Mr. Richard based on the issue in *Baze* for which certiorari had been granted that morning. Mr. Marty promised to keep the judges informed and circulate a copy of any pleadings when he received them.
17. Judge Keller left her chambers at the CCA during the afternoon on September 25, 2007, to meet a repairman at her home. Judge Keller did not return to the CCA that day.
18. TDS had computer problems that they anticipated would prevent them from filing with the CCA by 5 p.m. At approximately 4:40 p.m., TDS called the clerk's office of the CCA and requested their filing be accepted a few minutes late. The CCA deputy clerk, Abel Acosta, told TDS that the clerk's office (or the Court) closed at 5 p.m., but that he would call Mr. Marty. He did so.
19. In response to Mr. Acosta's call, Mr. Marty called Judge Keller at her home at about 4:45 p.m., looking for direction, and asked her whether the clerk's office (or the Court) could

stay open past 5 p.m.¹ Judge Keller said “no” and asked “Why?” Mr. Marty replied: “They wanted to file something, but they were not ready.” Judge Keller again said “no.”

20. Based on Judge Keller's reply, Mr. Marty told Mr. Acosta not to accept a filing after 5:00 p.m. Mr. Acosta called TDS at approximately 4:48 p.m. and told them that the clerk's office (or the Court) would close promptly at 5 p.m. A TDS paralegal told Mr. Acosta that she would take the filing to the Court and drop it with a security guard. Mr. Acosta replied he did not know what good that would do because no filing would be accepted after 5 p.m. TDS called back and asked if they could e-mail the filing to the CCA. Mr. Acosta told them that the decision had already been made not to accept a filing after 5 p.m. TDS called Mr. Acosta shortly before 6:00 p.m. and told him that they were headed to the Court to hand deliver the filing on behalf of Mr. Richard. Mr. Acosta told TDS not to bother, because no one was there to accept the filing.
21. At approximately 4:59 p.m., Judge Keller called Mr. Marty from her home and asked him whether the lawyers had filed anything with the CCA concerning the scheduled execution. Mr. Marty told Judge Keller they had not.
22. Judge Keller did not refer Mr. Marty or his inquiries to Judge Johnson, the assigned judge. Neither Judge Johnson nor the other judges who remained at the Court after 5 p.m. were aware that Mr. Richard's lawyers had called to ask whether filings after 5 p.m. could be accepted.
23. Mr. Richard was executed by the State of Texas by lethal injection at approximately 8:20 p.m. on September 25, 2007.
24. At the time of her telephone conversations with Mr. Marty, Judge Keller knew and understood that (i) Mr. Marty's call was about the execution that was scheduled that evening, (ii) the execution was scheduled to occur at 6 p.m. that evening, (iii) certiorari had been granted in *Baze* that morning, (iv) a filing to prevent the execution based on the issue in *Baze* was likely to occur, (v) lawyers for the person scheduled to be executed wanted to file something with the CCA, (vi) the lawyers were not ready to file with the CCA by 5 p.m., and that (vii) the lawyers had requested that they be permitted to file after 5 p.m. In addition, Judge Keller knew that it had been common in the past to receive late filings on execution days after the clerk's office closed, and she knew that the Execution-day Procedures called for the designated judge to remain available after hours to receive last-minute communications regarding the scheduled execution.
25. On September 25, 2007, Judge Keller also knew that she was not the designated judge in charge of that evening's scheduled execution. Further, she knew that a specific judge was the designated judge and that, under the CCA Execution-day Procedures, all communications relating to the scheduled execution that evening were required to be first referred to the designated judge.

¹ Mr. Marty recalls telling Judge Keller “they wanted the Court to stay open late,” or “they want to hold the court open.” Judge Keller, however, claims that Mr. Marty referred to the *clerk's* office, not the Court, and that he asked her the specific question of whether the clerk's office stayed open past 5 p.m.

26. Although Judge Keller knew that the communications relayed to her by Mr. Marty related to the scheduled execution, she disregarded the CCA's Execution-day Procedures. Her response to Mr. Marty failed to direct that he relay the communication to the designated judge, Judge Johnson, who was responsible for the handling of Mr. Richard's case and who remained present at the court after 5:00 p.m. to await any filings with the Court. Instead, Judge Keller gave instructions to Mr. Marty that had the effect of closing any further access by Mr. Richard's lawyers with the CCA concerning the effort to obtain a stay of Mr. Richard's execution based on the legal issue for which the USSC had granted certiorari that very day.
27. The next morning, September 26, 2007, Judge Keller and the other CCA judges met for a conference. At the end of the conference, several of the judges discussed their surprise that Mr. Richard's lawyers had not filed anything with the CCA based on *Baze*. Judge Cochran, who was not yet aware of Mr. Marty's communications with Judge Keller the night before, posed a hypothetical in which someone called the clerk's office before 5 o'clock, said they wanted to file something, but could not get it there before 5 p.m. Judge Cochran's position was that the CCA should allow the late filing. Judge Keller simply responded, "The Clerk's office closes at 5 p.m.; it's not a policy, it's a fact." Judge Keller did not disclose to the other judges her communications with Mr. Marty the night before, nor the fact that Mr. Richard's lawyers had called the CCA to ask whether filings after 5 p.m. could be accepted.
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31. Journalists throughout Texas and the nation have weighed in on the Richard case, and the response has been overwhelmingly negative. Examples include:
 - The *Houston Chronicle* began an editorial this way: "The events of Sept. 25 have put a stain on Texas justice that can only be cleaned by the removal of Chief Justice Sharon Keller from the Texas Court of Criminal Appeals." The editorial went on to describe Judge Keller's

actions as "legally inexcusable," "mind boggling," and a "miscarriage of justice."

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32. Judge Keller's current term in office expires in 2012.

33. At the time of this notice Judge Keller continues to perform judicial duties.

RELEVANT STANDARDS

1. Article 5, Section 1-a(6)A of the Texas Constitution provides, in relevant part, that any justice or judge of the courts established by the Constitution or created by the Legislature may be removed from office for "incompetence in performing the duties of office, willful violation of the Code of Judicial Conduct, or willful or persistent conduct that is clearly inconsistent with the proper performance of his duties or casts public discredit upon the judiciary or administration of justice."
2. Section 33.001(b) of the Texas Government Code defines "willful or persistent conduct that is clearly inconsistent with the proper performance of a judge's duties" as, among other things: "(1) willful, persistent, and unjustifiable failure to timely execute the business of the court, considering the quantity and complexity of the business; (2) willful violation of a provision of the Texas penal statutes or the Code of Judicial Conduct; (3) persistent or willful violation of the rules promulgated by the supreme court; (4) incompetence in the performance of the duties of the office; . . ."
3. Article 1, Section 13 of the Texas Constitution, provides, in relevant part, that "All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law."
4. Canon 2A of the Texas Code of Judicial Conduct requires that a judge shall comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
5. Cannon 3B(8) of the Texas Code of Judicial Conduct requires that a judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. . . . A judge shall require compliance with this subsection by court personnel subject to the judge's direction and control.
6. Canon 3C(1) of the Texas Code of Judicial Conduct requires that a judge should diligently and promptly discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and should cooperate with other judges and court officials in the administration of court business.
7. Canon 3C(2) of the Texas Code of Judicial Conduct requires that a judge should require staff, court officials and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties.

CHARGE I

Judge Keller's failure to follow CCA's Execution-day Procedures on September 25, 2007, and failure to require or assure compliance by the CCA General Counsel and clerk staff with respect to Mr. Richard's right to be heard, constitutes willful or persistent conduct that is clearly inconsistent with the proper performance of her duties as a judge of the CCA and as the Presiding Judge, in violation of the standards set forth in (i) Article 5, Section 1-a(6)A of the Texas Constitution, (ii) 33.001(b) of the Texas Government Code, (iii) Article 1, Section 13 of the Texas Constitution, (iv) Canon 2A of the Texas Code of Judicial Conduct, (v) Cannon 3B(8) of the Texas Code of Judicial Conduct, (vi) Cannon 3C(1) of the Texas Code of Judicial Conduct, and (vii) Cannon 3C(2) of the Texas Code of Judicial Conduct.

CHARGE II

Judge Keller's failure to follow CCA's Execution-day Procedures on September 25, 2007, and failure to require or assure compliance by the CCA General Counsel and clerk staff with respect to Mr. Richard's right to be heard, constitutes willful or persistent conduct that casts public discredit on the judiciary or the administration of justice, in violation of the standards set forth in (i) Article 5, Section 1-a(6)A of the Texas Constitution, (ii) 33.001(b) of the Texas Government Code, (iii) Article 1, Section 13 of the Texas Constitution, (iv) Canon 2A of the Texas Code of Judicial Conduct, (v) Cannon 3B(8) of the Texas Code of Judicial Conduct, (vi) Cannon 3C(1) of the Texas Code of Judicial Conduct, and (vii) Cannon 3C(2) of the Texas Code of Judicial Conduct.

CHARGE III

Judge Keller's conduct on September 25, 2007, did not accord Mr. Richard access to open courts or the right to be heard according to law. Judge Keller's conduct constitutes willful or persistent conduct that is clearly inconsistent with the proper performance of her duties as a judge of the CCA and as the Presiding Judge, in violation of the standards set forth in (i) Article 5, Section 1-a(6)A of the Texas Constitution, (ii) 33.001(b) of the Texas Government Code, (iii) Article 1, Section 13 of the Texas Constitution, (iv) Canon 2A of the Texas Code of Judicial Conduct, (v) Cannon 3B(8) of the Texas Code of Judicial Conduct, (vi) Cannon 3C(1) of the Texas Code of Judicial Conduct, and (vii) Cannon 3C(2) of the Texas Code of Judicial Conduct.

CHARGE IV

Judge Keller's conduct on September 25, 2007, did not accord Mr. Richard access to open courts or the right to be heard according to law. Keller's conduct constitutes willful or persistent conduct that casts public discredit on the judiciary or the administration of justice, in violation of the standards set forth in (i) Article 5, Section 1-a(6)A of the Texas Constitution, (ii) 33.001(b) of the Texas Government Code, (iii) Article 1, Section 13 of the Texas Constitution, (iv) Canon 2A of the Texas Code of Judicial Conduct, (v) Cannon 3B(8) of the Texas Code of Judicial Conduct, (vi) Cannon 3C(1) of the Texas Code of Judicial Conduct, and (vii) Cannon 3C(2) of the Texas Code of Judicial Conduct.

CHARGE V

Judge Keller's failure to follow CCA's Execution-day Procedures on September 25, 2007, and failure to require or assure compliance by the CCA General Counsel and clerk staff with respect to Mr. Richard's right to be heard, constitutes incompetence in the performance of duties of office, in violation of the standards set forth in (i) Article 5, Section 1-a(6)A of the Texas Constitution, (ii) 33.001(b) of the Texas Government Code, (iii) Canon 2A of the Texas Code of Judicial Conduct, (iv) Cannon 3C(1) of the Texas Code of Judicial Conduct, and (v) Cannon 3C(2) of the Texas Code of Judicial Conduct.

Signed this 15th day of June, 2009

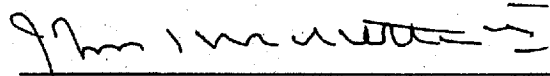
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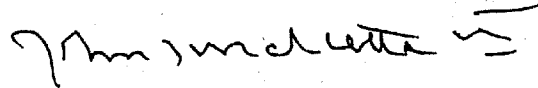


John J. McKetta III

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on this 15th day of June, 2009, via electronic mail, facsimile transmission and U.S. certified mail, return receipt requested, on the following:

Mr. Charles "Chip" Babcock
JACKSON WALKER, LLP
1401 McKinney Street, Suite 1900
Houston, Texas 77010



John J. McKetta, III

Appendix F

COPY

BEFORE THE STATE COMMISSION ON JUDICIAL CONDUCT

IN RE: §
HONORABLE SHARON KELLER §
PRESIDING JUDGE OF THE §
TEXAS COURT OF CRIMINAL §
APPEALS §

INQUIRY CONCERNING
JUDGE, NO. 96

FILE STAMPED COPY

By it Date 1/20/10
Clerk of the Commission
State Commission on Judicial Conduct

SPECIAL MASTER'S FINDINGS OF FACT

On September 25, 2007, the Texas criminal justice system suffered several lapses of communication at various levels—and in particular, at both the Texas Court of Criminal Appeals ("TCCA") and the Texas Defender Service ("TDS"). The Examiner for the Commission on Judicial Conduct (the "Examiner") filed five charges against TCCA Presiding Judge Sharon Keller ("Judge Keller") stemming from the events of that day.¹ Both the TDS and Judge Keller point fingers at each other, claiming that the other caused the execution of Michael Wayne Richard ("Richard") that evening, even though, earlier in the day, the Supreme Court had indicated that it

¹ Charge I states, "Judge Keller's willful and persistent failure to follow CCA's Execution-day Procedures on September 25, 2007, constitutes willful or persistent conduct that is clearly inconsistent with the proper performance of her duties as Presiding Judge" Charge II provides, "Judge Keller's willful and persistent failure to follow CCA's Execution-day Procedures on September 25, 2007, constitutes willful or persistent conduct that casts public discredit on the judiciary or the administration of justice" In Charge III, the Examiner alleges, "Judge Keller's conduct on September 25, 2007, did not accord Mr. Richard access to open courts or the right to be heard according to law. Judge Keller's conduct constitutes willful or persistent conduct that is clearly inconsistent with the proper performance of her duties as Presiding Judge" Charge IV states, "Judge Keller's conduct on September 25, 2007, did not accord Mr. Richard access to open courts or the right to be heard according to law. Keller's conduct constitutes willful or persistent conduct that casts public discredit on the judiciary or the administration of justice" Finally, Charge V provides, "Judge Keller's willful and persistent failure to follow CCA's Execution-day Procedures on September 25, 2007, constitutes incompetence in the performance of duties of office" The Examiner claims in the Charges that Judge Keller acted "in violation of the standards set forth in (i) Article 5, Section 1-a(6)A of the Texas Constitution, (ii) Canon 2A of the Texas Code of Judicial Conduct, (iii) Article 1, Section 13 of the Texas Constitution, and (iv) Canon 3B(8) of the Texas Code of Judicial Conduct."

wanted to review the constitutionality of execution by lethal injection. Ultimately, the TDS never presented a lethal injection challenge to the TCCA. What is clear is that all sides are at fault for these communication failures. What is also clear is that, although Judge Keller's conduct on that day was not exemplary, she did not engage in conduct so egregious that she should be removed from office. Indeed, although Judge Keller's actions did not help the situation, the majority of the problems involving the Richard execution were the responsibility of the TDS.

I.

A Texas jury convicted Richard of capital murder stemming from an incident that occurred on August 18, 1986. He was sentenced to death and went through the state and federal appeals processes. After exhausting his then-available appeals, he was scheduled for execution on September 25, 2007.

The execution was scheduled to occur anytime after 6:00 p.m. That morning, the United States Supreme Court announced that it would hear a case called *Baze v. Rees*, which raised the issue of whether Kentucky's three-drug protocol for lethal injection violated the Eighth Amendment's prohibition against cruel and unusual punishment. Texas uses the same three-drug protocol; accordingly, the decision in *Baze* would impact Texas's death penalty procedure.

With the benefit of 20/20 hindsight, we now know that the Supreme Court stayed all executions in the United States besides Richard's until it resolved *Baze* on April 16, 2008. See *Baze v. Rees*, 553 U.S. 35 (2008). However, on the morning the Court announced that it would hear *Baze*, the legal community did not fully appreciate the impact the decision to review Kentucky's death penalty procedure

would have on all other executions in the United States. The TDS, which represented Richard, thus had only a few hours to seek a stay of Richard's execution based on the Supreme Court's decision that morning.

Because the TDS would likely ask the Supreme Court to stay Richard's execution pursuant to the Court's decision to hear the lethal injection case (assuming the lower courts did not first grant a stay), it had to do so through a writ of habeas corpus. To present a habeas claim to the Supreme Court, a litigant must exhaust all possible state remedies. That is, the Supreme Court will not consider a habeas claim—even in a death penalty case—unless the state courts first pass upon the issue. See 28 U.S.C. § 2254. This procedural mechanism is well known among death penalty lawyers. Accordingly, before the United States Supreme Court would even consider whether to stay Richard's execution based on its decision to hear *Baze*, Richard had to exhaust that argument before the Texas courts. That is, he had to present a lethal injection argument to the TCCA. Only after the TCCA rejected the claim would he be able to seek relief from the Supreme Court. Thus, his lawyer's failure to raise the lethal injection argument to the TCCA doomed his ability to successfully ask the Supreme Court to stay his execution.²

II.

At around 9:00 a.m. central time on the morning of September 25, 2007, the Supreme Court announced that it would review *Baze*. At approximately 11:40 a.m., TDS lawyers—including David Dow ("Dow"), Greg Wiercioch ("Wiercioch"), and

² Indeed, the TDS eventually submitted its lethal injection claim to the Supreme Court, but the Court denied the request for a stay without comment.

Alma Lagarda ("Lagarda")—participated in a conference call, during which they first discussed the Supreme Court's decision that morning. These lawyers were working in TDS's Houston office. After the call, Dow, a professor of law at the University of Houston and TDS's Litigation Director, instructed Lagarda, a junior attorney, to draft a writ of prohibition, a motion for leave to file the writ, a successor application for a writ of habeas corpus, and a motion to stay the execution, based on the Supreme Court's decision to review Kentucky's lethal injection procedure. Dow and Wiercioch continued to focus on an *Atkins* claim they planned to raise, challenging Richard's execution based on mental retardation. Dow admitted that he believed the *Atkins* claim was a more effective vehicle for obtaining a stay of execution, especially because the Supreme Court had never before entered the fray of considering the constitutionality of lethal injection.

Around 3:30, Lagarda completed her draft of the petition for a writ of prohibition and sent it to Dow, and he began to revise it. She had not yet started working on the other filings. Dow returned the petition for a writ of prohibition to Lagarda at 4:00, and she completed the document by 4:45. Meanwhile, Wiercioch was working on the *Atkins* claim, and he filed a motion with the United States Supreme Court. He then offered to assist on the lethal injection claim. The TDS did not complete the lethal injection pleadings until after 5:00, when the TCCA's clerk's office closes.

There is a dispute among the parties regarding whether the TDS was embarking on the correct strategy to raise the lethal injection argument to the TCCA. The TDS asserts that it was preparing the proper motions, while Judge Keller

contends that there were easier vehicles to raise a lethal injection claim. Whether there were better avenues to pursue this claim, however, is largely irrelevant given the TDS's other mistakes that day. The mechanism the TDS planned to use to raise this argument also had no impact on Judge Keller's decisions in this matter.

III.

Just because the TDS did not have its lethal injection papers ready by 5:00 did not mean that it was absolutely foreclosed from filing them at all. The TDS simply had to find the correct way to file the documents. The question, then, is whether the TDS adequately pursued the proper avenues to present the pleadings to the TCCA, and whether Judge Keller acted reasonably in directing the TCCA's staff as to what to tell the TDS after it inquired if it could file something past 5:00.

At 4:35 on September 25, 2007, Dorinda "Rindy" Fox ("Fox"), a paralegal in TDS's Austin office who was at a doctor's appointment at that time, received a phone call from Melissa "Liz" Waters ("Waters"), another TDS Austin paralegal. Waters relayed to Fox that Dow told Waters that the TDS planned to file a motion with the TCCA, but that it was not yet ready. Waters asked Fox to call Abel Acosta ("Acosta"), a deputy clerk at the TCCA. Fox knew Acosta from previous interactions with him.

At 4:40, Fox called Acosta and explained that the TCCA would be filing something in the Richard case, but that she did not think it would be ready by 5:00, when the TCCA's clerk's office closed. Acosta said that he needed to check with someone to find out if it would be possible for the TDS to file something in the clerk's office after 5:00. Acosta had accepted "late" filings in the past, but in doing so

he had simply taken the papers after 5:00 and waited until the next day to stamp them—something that of course was not possible in the Richard case.

Acosta then called Edward Marty ("Marty"), the TCCA General Counsel. Marty, in turn, called Judge Keller, who was at home but was accessible. Although the parties dispute the precise words Judge Keller used and exactly what she was trying to convey, the gist is that Judge Keller told Marty that the TCCA would not be able to formally file any documents past 5:00. Judge Keller and Marty both assert that Judge Keller was referring to whether the clerk's office, and not the TCCA as a whole, could stay open past 5:00, to which she twice replied "no." The Examiner contends that Judge Keller in essence was saying that the "court," as opposed to merely the clerk's office, would close at 5:00 regardless of the TDS's attempt to file something in the Richard case. Marty then called Acosta, relaying the information that the clerk's office (or the court) would close at 5:00. Acosta called Fox, stating, "I was told to tell you that we close at 5:00." It is unclear whether he was referring to the clerk's office or the court. Most likely, neither he nor anyone else during these communications was making a precise distinction between the two.

Upon learning this news, Fox called TDS's Houston office and spoke with Lagarda. At 4:59, Judge Keller called Marty, asking whether the TDS had filed anything. Marty told her that it had not. At 5:07, Waters, the other TDS paralegal, called Acosta, seeking to confirm that the TCCA would not accept any late filings. Waters claims that she mentioned the TDS's alleged computer problems in preparing the documents during this conversation; Acosta does not remember learning this information from either Waters or Fox. Waters also asked if the TDS

could email or fax the documents; Acosta responded no. Acosta reiterated that the clerk's office (or the court) closed at 5:00.

At 5:56, Fox called Acosta, telling him that the TDS had the filing ready and asking how she should proceed. Acosta told her not to bother coming over to the court, as the clerk's office (or the court) was closed. Fox asked whether she could leave it with a security guard at the courthouse. Acosta explained that the guard would not be able to file the document. At that point, Fox believed that she had explored all avenues for filing the lethal injection papers, and she did not attempt to file them in any other way. Importantly, no TDS lawyers were involved in speaking with the TCCA staff or attempting to file the documents. This highlights one of the TDS's vital mistakes: it should have had its lawyers—the licensed experts in the organization with experience in last-minute death penalty appeals—verify the information from the TCCA and try to find other ways to file the papers.

IV.

On September 25, 2007, the TCCA did not have written procedures for execution days, but it had an "oral tradition" on how to proceed. That oral tradition provided that all communications from any lawyers to the TCCA on the day of a scheduled execution were to be made to the assigned judge for that execution. That is, for every scheduled execution, the TCCA's General Counsel would assign one of the judges (based on a rotating schedule) to receive all communications regarding that case on the execution day and to coordinate the court's response. The purpose of this rule was to ensure that one judge was the point person for anything related

to the case. The public, however, was not aware of which judge was the assigned judge for any particular death penalty case.

For the *Richard* matter, Ed Marty, the General Counsel, assigned Judge Cheryl Johnson as the assigned judge. Thus, Judge Johnson should have received all communications regarding the *Richard* case on September 25, 2007. Although this oral tradition was not a court or statutory rule, the TCCA Judges knew that there was an assigned judge for every death penalty case, and they knew that Judge Johnson was the assigned judge for the *Richard* matter. They therefore understood that all communications regarding the scheduled execution should have been directed to Judge Johnson. After the events in the *Richard* case became widely known, the TCCA reduced the execution day procedures to written rules for the Court.

The TCCA's staff also knew of this oral tradition. Indeed, Marty, as the General Counsel, was the person who named Judge Johnson the assigned judge. Thus, when he received the phone call from Acosta explaining that the TDS was requesting more time to file a lethal injection claim, he should have referred the question to Judge Johnson, not Judge Keller.³ Judge Keller also should have told Marty to refer the TDS's call to Judge Johnson instead of answering it herself.

But Judge Keller had a reason to answer the TDS's question. She construed its inquiry as a request to keep the clerk's office open after 5:00 (as opposed to the court as a whole). Under Tex. Gov't Code 658.005(a), "Normal office hours of a state

³ It is unclear whether Acosta knew of the oral tradition regarding execution day communications, but he too should have referred the question to Judge Johnson.

agency are from 8 a.m. to 5 p.m., Monday through Friday," but under subsection (b), "if a chief administrator of a state agency considers it necessary or advisable, offices also may be kept open during other hours and on other days." Judge Keller, as the Presiding Judge and chief administrator of the TCCA (a state agency), therefore could decide to keep the clerk's office open past 5:00 p.m. If the TDS was asking for the clerk's office to stay open past 5:00, then Judge Keller was the only person who could approve or deny that request.

This explanation does not fully absolve Judge Keller for failing to refer the TDS's request to Judge Johnson. But it does suggest that her actions were not nefarious or a purposeful attempt to circumvent the TCCA's execution day procedures. Indeed, she argues that she chose not to keep the clerk's office open because she did not want to require the clerk's office staff to stay late, especially given that, as discussed below, there were other ways for the TDS to file its motion. The TCCA had never kept the clerk's office open past 5:00 on an execution day. Further, there is simply no evidence that by saying "no" twice, Judge Keller was indicating to Marty that the entire court should close at 5:00; nor did she have the power to close the court or access to all judges. Under the Texas Government Code, she refused what she deemed to be a request to keep the clerk's office open beyond its statutory closing time. Although Judge Keller might have exhibited poor judgment in making this decision, it was within her sole discretion. Further, although she certainly exhibited poor judgment in not reminding Marty of the TCCA's execution day procedure and in failing to notify Judge Johnson of the TDS's

communication, this inaction does not rise to the level of willful or purposeful incompetence.

As noted above, Judge Keller could not shut off all access to the TCCA judges.

Texas Rule of Appellate Procedure 9.2(a) provides,

With Whom. A document is filed in an appellate court by delivering it to:

- (1) the clerk of the court in which the document is to be filed; or
- (2) a justice or judge of that court who is willing to accept delivery. A justice or judge who accepts delivery must note on the document the date and time of delivery, which will be considered the time of filing, and must promptly send it to the clerk.

Thus, there were two ways for the TDS to file its lethal injection claim with the TCCA. It could have submitted its motion to the clerk's office—an option that was no longer available after Judge Keller chose not to keep the clerk's office open past 5:00. But it also could have sought to find a judge of the court that would accept the filing. Judge Johnson explicitly stated that she would have accepted a filing from the TDS, even after 5:00.⁴ Judge Johnson's chamber's phone number, much like the

⁴ The parties in this case disagree vehemently regarding whether Marty told Judge Johnson about the TDS's request to file a pleading after 5:00. This dispute centers around a hallway meeting between Judge Johnson and Judges Womack and Price at around 5:30 that afternoon. Judge Johnson stated that the three judges were expressing their surprise that Richard had not filed anything to challenge Texas's use of lethal injection given the Supreme Court's decision in *Baze* earlier that day. According to Judge Johnson, Marty was standing nearby and was listening to the conversation, but he did not say anything or notify the judges that the TDS had called the court but that Judge Keller had refused their request to stay open late. Judge Keller posits that it would be implausible for Marty to stand only a few feet away from the judges and remain silent, in essence eavesdropping. Whether this occurred, however, is largely irrelevant to the complaints levied against Judge Keller. Even if Marty had stood there quietly listening to the judges, his actions have nothing to do with whether Judge Keller was responsible for the TDS's failure to present the lethal injection claim. Further, assuming Marty told the judges that the TDS had sought to file something late but that Judge Keller had refused, this likely would not have changed anything; Judge Johnson does not suggest that she would have affirmatively reached out to the TDS to tell it

phone numbers of the other TCCA judges and the General Counsel, is in the Austin phone book. Accordingly, had the TDS simply called the chambers of each TCCA judge, it would have found a judge who would accept the filing after 5:00.

Additionally, it is not as if the TDS's lawyers were unaware of Rule 9.2(a)(2). They knew that the previous General Counsel, Rick Wetzel ("Wetzel"), had a policy of accepting filings after 5:00 in death penalty cases. They also had worked on the *Rivera* case in August 2003, in which they had presented a late pleading to Wetzel on the day of the scheduled execution. Further, as experienced death penalty appellate lawyers, the TDS counsel should have known of the ways in which they could file last-minute documents. It is not up to the court or its staff to tell the TDS how to present its filings. The TDS, however, did not even have its lawyers communicate with the TCCA as it sought to determine how to file the lethal injection papers. Dow and Wiercioch instead relied on the TDS's paralegals to communicate with Acosta. This was a crucial mistake; had they themselves called Marty or any of the TCCA judges, they likely would have been able to present the lethal injection claim. Their error does not implicate Judge Keller.

Judge Keller certainly did not exhibit a model of open communication. She should have been more forthcoming with Marty that he should, at a minimum, notify Judge Johnson of the TDS's call. She also could have called Judge Johnson herself, for she knew that Judge Johnson was the assigned judge for the *Richard* matter that day.

that she would accept the pleading. The hallway conversation—and whether Judge Johnson learned that day that the TDS had called the court—thus has little bearing on the resolution of the key issues before the Special Master.

Further, Judge Keller should have spoken up the next morning when, during a conference of the judges, some of her colleagues expressed surprise that Richard had not filed anything the night before. Indeed, many of the judges, including Judge Johnson, learned that the TDS had sought to file a lethal injection claim by reading the newspaper that weekend. Judge Keller's silence at this meeting goes contrary to the ideals of judicial collegiality. But it did not impact the TDS's ability to file its pleading before Richard's execution.

V.

Both in the media and during this proceeding, the Examiner has faulted Judge Keller for choosing not to allow the TDS to file the lethal injection papers late given that the TDS was experiencing severe computer problems—including a “series of computer crashes”—which was purportedly the cause of the delay. But the evidence demonstrates that the TDS was not having major computer problems. Lagarda agreed that no computer issues prevented her from creating or completing the necessary documents. The alleged problems were with the TDS's email, and specifically, the ability to email from one person in the Houston office to another.

In an effort to dig deeper into the TDS's allegations of computer problems, Judge Keller subpoenaed the TDS for documentation regarding the technological issues it encountered on September 25, 2007. The TDS was unable to produce anything to corroborate its complaints of computer problems. Judge Keller then contacted Bayou City Connected, the company the TDS said had dealt with their computer issues. But Bayou City Connected first worked on the TDS's computer systems on November 13, 2007. The TDS changed its story again, saying that it had

actually used Bone Computer on September 25, 2007. But the last invoice Bone Computer could find for work it performed for the TDS was dated April 11, 2007. Judge Keller then inquired into whether Internet America, TDS's internet provider, reported any outages on September 25, 2007. Internet America's records showed a system-wide problem with a spam filter on the morning of September 25, 2007, which it corrected before noon that day.

In sum, there is no evidence in the record to confirm that the TDS suffered any computer issues that slowed its ability to prepare the lethal injection claim on September 25, 2007. The TDS lawyers may have had an internal problem emailing the files from one person to another in the Houston office. But there is nothing to suggest that the reason it was late with the filings was because of a serious computer malfunction. Much like a lot of the other allegations in this case, the "serious computer crash" story seems to be an embellishment that was blown out of proportion in the media. In sum, the Examiner has not shown that the TDS was late because of unprecedented computer problems. The TDS's failure to have the documents ready was due to its own issues unrelated to any computer malfunction. Thus, the TDS has only itself to blame for not having the pleadings prepared by 5:00.

VI.

Before Judge Keller faced official charges of judicial incompetence, the TDS in essence tried this case through the media. The news articles and accompanying public outcry rendered a "verdict" of guilty as charged. But much like the children's game of telephone, the media's reporting began with minor inaccuracies and became more and more embellished, leading to plainly false assumptions about

Judge Keller's role in the Richard execution. The TDS was the catalyst for this media and public groundswell of opposition against Judge Keller.

Several newspaper stories quoted Dow shortly after Richard was executed on September 25, 2007. Dow told the newspapers that the TDS had suffered a computer crash, which impeded its ability to file the lethal injection claim. But there is little evidence that computer problems significantly slowed the preparation of these documents. An article in the Dallas Morning News quoted Dow as stating, "I think that Michael Richard got executed because the Court of Criminal Appeals couldn't be bothered to stay open 20 minutes late so we could get all our briefs in." Dow repeated this claim in the New York Times, the Washington Post, and the Houston Chronicle, among others, and the story was spread nationwide. The evidence demonstrates, however, that the TDS was not ready to file the lethal injection claim until 5:56, not 5:20. Dow has now admitted that his quote inaccurately represented what actually occurred that day. Similarly, Dow stated in news reports that TDS lawyers "pleaded" with Judge Keller to stay open to allow the filing, but TDS paralegals, not lawyers, were the ones to call the deputy clerk to ask about filing the papers after 5:00. These distortions effectively placed blame on Judge Keller for Richard's execution that day. They also led to increased public scrutiny of Judge Keller's actions, and, ultimately, the Examiner's charges. That is, the Examiner's charges largely rest on what ended up being misleading media reports, which started from Dow's inaccurate statements in the press and spun out of control.

VII.

As the foregoing discussion demonstrates, the TDS bears the bulk of fault for what occurred on September 25, 2007. Although its mission and goal of assisting death penalty litigants is certainly an admirable one, its actions in the *Richard* case did not match its typically estimable practice. The TDS did not begin contemplating the lethal injection claim until over two hours after the Supreme Court agreed to hear *Baze*. It assigned a junior attorney to draft all of the necessary papers, and did not have the first document ready until 4:45 and the remaining documents ready until 5:56. It failed to pursue all possible ways to file the claim. It relied on its paralegals, instead of its experienced lawyers, to communicate with the TCCA's staff. Then, after it became clear that the Supreme Court would be staying all executions until it resolved *Baze*, the TDS embellished the computer problems it suffered and untruthfully told the media that it was ready to file at 5:20 but that Judge Keller had already closed the court house doors. Indeed, the TDS was quite successful in causing a public uproar against Judge Keller, much of which was unwarranted.

Judge Keller's conduct, however, was not exemplary of a public servant. She should have been more open and helpful about the way in which the TDS could present the lethal injection claim to the TCCA. She should have directed the TDS's communication to Judge Johnson. Although she says that if she could do it all over again she would not change any of her actions, this cannot be true. Any reasonable person, having gone through this ordeal, surely would realize that open communication, particularly during the hectic few hours before an execution, would benefit the interests of justice. Further, her judgment in not keeping the clerk's

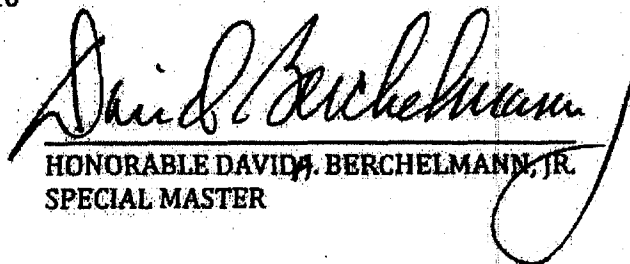
office open past 5:00 to allow the TDS to file was highly questionable. In sum, there is a valid reason why many in the legal community are not proud of Judge Keller's actions.

Judge Keller's silence on several occasions conflicts with the ideal that courts should foster open communication among court staff and litigants. But Judge Keller's omission did not *cause* the TDS to be late in its filing, to forget the other available avenues, or to fail to have any of its experienced lawyers contact the TCCA. She did not violate any written or unwritten rules or laws. Of course, that does not absolve her of the responsibility to ensure that the courts remain fair and just. Her conduct, however, does not warrant removal from office, or even further reprimand beyond the public humiliation she has surely suffered.

In the end, perhaps this entire ordeal can have positive consequences for the future. The TCCA has reduced its oral tradition for its execution day procedure to written form, which will provide clarity and certainty moving forward. Appellate counsel, including death penalty lawyers, certainly now know of all of the available avenues to present a claim, even after the clerk's office has closed. Finally, we should all be reminded of the responsibilities a public servant has to ensure and promote fairness in the criminal justice system.

SO FOUND.

DATED: January 14, 2010


HONORABLE DAVID A. BERCHELMANN, JR.
SPECIAL MASTER

Appendix G

Effective: November 6, 2007

Vernon's Texas Statutes and Codes Annotated Currentness

Constitution of the State of Texas 1876 (Refs & Annos)

■ Article V. Judicial Department

→ § 1-a. Retirement, censure, removal and compensation of justices and judges; State Commission on Judicial Conduct; procedure

(1) Subject to the further provisions of this Section, the Legislature shall provide for the retirement and compensation of Justices and Judges of the Appellate Courts and District and Criminal District Courts on account of length of service, age and disability, and for their reassignment to active duty where and when needed. The office of every such Justice and Judge shall become vacant on the expiration of the term during which the incumbent reaches the age of seventy-five (75) years or such earlier age, not less than seventy (70) years, as the Legislature may prescribe, except that if a Justice or Judge elected to serve or fill the remainder of a six-year term reaches the age of seventy-five (75) years during the first four years of the term, the office of that Justice or Judge shall become vacant on December 31 of the fourth year of the term to which the Justice or Judge was elected.

(2) The State Commission on Judicial Conduct consists of thirteen (13) members, to wit: (i) one (1) Justice of a Court of Appeals; (ii) one (1) District Judge; (iii) two (2) members of the State Bar, who have respectively practiced as such for over ten (10) consecutive years next preceding their selection; (iv) five (5) citizens, at least thirty (30) years of age, not licensed to practice law nor holding any salaried public office or employment; (v) one (1) Justice of the Peace; (vi) one (1) Judge of a Municipal Court; (vii) one (1) Judge of a County Court at Law; and (viii) one (1) Judge of a Constitutional County Court; provided that no person shall be or remain a member of the Commission, who does not maintain physical residence within this State, or who shall have ceased to retain the qualifications above specified for that person's respective class of membership, and provided that a Commissioner of class (i), (ii), (iii), (vii), or (viii) may not reside or hold a judgeship in the same court of appeals district as another member of the Commission. Commissioners of classes (i), (ii), (vii), and (viii) above shall be chosen by the Supreme Court with advice and consent of the Senate, those of class (iii) by the Board of Directors of the State Bar under regulations to be prescribed by the Supreme Court with advice and consent of the Senate, those of class (iv) by appointment of the Governor with advice and consent of the Senate, and the commissioners of classes (v) and (vi) by appointment of the Supreme Court as provided by law, with the advice and consent of the Senate.

(3) The regular term of office of Commissioners shall be six (6) years; but the initial members of each of classes (i), (ii) and (iii) shall respectively be chosen for terms of four (4) and six (6) years, and the initial members of class (iv) for respective terms of two (2), four (4) and six (6) years. Interim vacancies shall be filled in the same manner as vacancies due to expiration of a full term, but only for the unexpired portion of the term in question. Commissioners may succeed themselves in office only if having served less than three (3) consecutive years.

(4) Commissioners shall receive no compensation for their services as such. The Legislature shall provide for the payment of the necessary expense for the operation of the Commission.

(5) The Commission may hold its meetings, hearings and other proceedings at such times and places as it shall determine but shall meet at Austin at least once each year. It shall annually select one of its members as Chairman. A quorum shall consist of seven (7) members. Proceedings shall be by majority vote of those present, except that recommendations for retirement, censure, suspension, or removal of any person holding an office named in Paragraph A of Subsection (6) of this Section shall be by affirmative vote of at least seven (7) members.

(6) A. Any Justice or Judge of the courts established by this Constitution or created by the Legislature as provided in Section 1, Article V, of this Constitution, may, subject to the other provisions hereof, be removed from office for willful or persistent violation of rules promulgated by the Supreme Court of Texas, incompetence in performing the

duties of the office, willful violation of the Code of Judicial Conduct, or willful or persistent conduct that is clearly inconsistent with the proper performance of his duties or casts public discredit upon the judiciary or administration of justice. Any person holding such office may be disciplined or censured, in lieu of removal from office, as provided by this section. Any person holding an office specified in this subsection may be suspended from office with or without pay by the Commission immediately on being indicted by a State or Federal grand jury for a felony offense or charged with a misdemeanor involving official misconduct. On the filing of a sworn complaint charging a person holding such office with willful or persistent violation of rules promulgated by the Supreme Court of Texas, incompetence in performing the duties of the office, willful violation of the Code of Judicial Conduct, or willful and persistent conduct that is clearly inconsistent with the proper performance of his duties or casts public discredit on the judiciary or on the administration of justice, the Commission, after giving the person notice and an opportunity to appear and be heard before the Commission, may recommend to the Supreme Court the suspension of such person from office. The Supreme Court, after considering the record of such appearance and the recommendation of the Commission, may suspend the person from office with or without pay, pending final disposition of the charge.

B. Any person holding an office named in Paragraph A of this subsection who is eligible for retirement benefits under the laws of this state providing for judicial retirement may be involuntarily retired, and any person holding an office named in that paragraph who is not eligible for retirement benefits under such laws may be removed from office, for disability seriously interfering with the performance of his duties, which is, or is likely to become, permanent in nature.

C. The law relating to the removal, discipline, suspension, or censure of a Justice or Judge of the courts established by this Constitution or created by the Legislature as provided in this Constitution applies to a master or magistrate appointed as provided by law to serve a trial court of this State and to a retired or former Judge who continues as a judicial officer subject to an assignment to sit on a court of this State. Under the law relating to the removal of an active Justice or Judge, the Commission and the review tribunal may prohibit a retired or former Judge from holding judicial office in the future or from sitting on a court of this State by assignment.

(7) The Commission shall keep itself informed as fully as may be of circumstances relating to the misconduct or disability of particular persons holding an office named in Paragraph A of Subsection (6) of this Section, receive complaints or reports, formal or informal, from any source in this behalf and make such preliminary investigations as it may determine. Its orders for the attendance or testimony of witnesses or for the production of documents at any hearing or investigation shall be enforceable by contempt proceedings in the District Court or by a Master.

(8) After such investigation as it deems necessary, the Commission may in its discretion issue a private or public admonition, warning, reprimand, or requirement that the person obtain additional training or education, or if the Commission determines that the situation merits such action, it may institute formal proceedings and order a formal hearing to be held before it concerning the public censure, removal, or retirement of a person holding an office or position specified in Subsection (6) of this Section, or it may in its discretion request the Supreme Court to appoint an active or retired District Judge or Justice of a Court of Appeals, or retired Judge or Justice of the Court of Criminal Appeals or the Supreme Court, as a Master to hear and take evidence in any such matter, and to report thereon to the Commission. The Master shall have all the power of a District Judge in the enforcement of orders pertaining to witnesses, evidence, and procedure. If, after formal hearing, or after considering the record and report of a Master, the Commission finds good cause therefor, it shall issue an order of public censure or it shall recommend to a review tribunal the removal or retirement, as the case may be, of the person in question holding an office or position specified in Subsection (6) of this Section and shall thereupon file with the tribunal the entire record before the Commission.

(9) A tribunal to review the Commission's recommendation for the removal or retirement of a person holding an office or position specified in Subsection (6) of this Section is composed of seven (7) Justices or Judges of the Courts of Appeals who are selected by lot by the Chief Justice of the Supreme Court. Each Court of Appeals shall designate one of its members for inclusion in the list from which the selection is made. Service on the tribunal shall

be considered part of the official duties of a judge, and no additional compensation may be paid for such service. The review tribunal shall review the record of the proceedings on the law and facts and in its discretion may, for good cause shown, permit the introduction of additional evidence. Within 90 days after the date on which the record is filed with the review tribunal, it shall order public censure, retirement or removal, as it finds just and proper, or wholly reject the recommendation. A Justice, Judge, Master, or Magistrate may appeal a decision of the review tribunal to the Supreme Court under the substantial evidence rule. Upon an order for involuntary retirement for disability or an order for removal, the office in question shall become vacant. The review tribunal, in an order for involuntary retirement for disability or an order for removal, may prohibit such person from holding judicial office in the future. The rights of an incumbent so retired to retirement benefits shall be the same as if his retirement had been voluntary.

(10) All papers filed with and proceedings before the Commission or a Master shall be confidential, unless otherwise provided by law, and the filing of papers with, and the giving of testimony before the Commission or a Master shall be privileged, unless otherwise provided by law. However, the Commission may issue a public statement through its executive director or its Chairman at any time during any of its proceedings under this Section when sources other than the Commission cause notoriety concerning a Judge or the Commission itself and the Commission determines that the best interests of a Judge or of the public will be served by issuing the statement.

(11) The Supreme Court shall by rule provide for the procedure before the Commission, Masters, review tribunal, and the Supreme Court. Such rule shall provide the right of discovery of evidence to a Justice, Judge, Master, or Magistrate after formal proceedings are instituted and shall afford to any person holding an office or position specified in Subsection (6) of this Section, against whom a proceeding is instituted to cause his retirement or removal, due process of law for the procedure before the Commission, Masters, review tribunal, and the Supreme Court in the same manner that any person whose property rights are in jeopardy in an adjudicatory proceeding is entitled to due process of law, regardless of whether or not the interest of the person holding an office or position specified in Subsection (6) of this Section in remaining in active status is considered to be a right or a privilege. Due process shall include the right to notice, counsel, hearing, confrontation of his accusers, and all such other incidents of due process as are ordinarily available in proceedings whether or not misfeasance is charged, upon proof of which a penalty may be imposed.

(12) No person holding an office specified in Subsection (6) of this Section shall sit as a member of the Commission in any proceeding involving his own suspension, discipline, censure, retirement or removal.

(13) This Section 1-a is alternative to and cumulative of, the methods of removal of persons holding an office named in Paragraph A of Subsection (6) of this Section provided elsewhere in this Constitution.

(14) The Legislature may promulgate laws in furtherance of this Section that are not inconsistent with its provisions.

CREDIT(S)

Added Nov. 2, 1948. Amended Nov. 2, 1965; Nov. 3, 1970; Nov. 8, 1977; Nov. 6, 1984, eff. Jan. 1, 1985; Nov. 6, 2001; Nov. 8, 2005; Nov. 6, 2007.

INTERPRETIVE COMMENTARY

2007 Main Volume

To attract competent and talented lawyers to the bench, adequate compensation upon retirement after years of service should be granted. Moreover, retirement at a certain age limit is thought to be promotive of good administration, although such retirement would not often come about if a pension were not offered.

To permit the legislature to provide for the retirement and compensation of judges of the appellate and district and criminal district courts on account of service, age or disability, Section 1-a was adopted by amendment in 1948. Such a section was necessary, if pensions were to be granted, because of the limitation provided in Section 51, Article III which prohibited the legislature from making any grant of public money to any individual.

Section 1-a also permits the legislature to provide for the reassignment of retired judges to active duty where and when needed. This is a desirable provision, and, by it, it is possible to make available to the state a small reserve of experienced men on whom it can call for help in disposing of suddenly overcrowded dockets or in handling certain types of business for which the particular retired judges are fitted by long experience.

HISTORICAL NOTES

2007 Main Volume

This section added in 1948 and adopted at the Nov. 2, 1948 election, was proposed by Acts 1947, 50th Leg., H.J.R. No. 39.

The 1965 amendment, proposed by Acts 1965, 59th Leg., p. 2227 H.J.R. No. 57 and adopted at the Nov. 2, 1965 election, rewrote the section, which prior thereto read:

"The Legislature shall provide for the retirement and compensation of Judges and Commissioners of the Appellate Courts and Judges of the District and Criminal District Courts on account of length of service, age or disability, and for their reassignment to active duty where and when needed."

The 1970 amendment, proposed by Acts 1969, 61st Leg., p. 3237, H.J.R. No. 30 and adopted at the Nov. 3, 1970 election, in subsec. (5), inserted "censure", and substituted "any person holding an office named in Paragraph A of Subsection (6) of this Section" for "Justices or Judges; rewrote subsec. (6), which prior thereto read:

"Any Justice or Judge within the scope of this Section 1--a may, subject to the other provisions hereof, be removed from office for willful or persistent conduct, which is clearly inconsistent with the proper performance of his said duties or casts public discredit upon the judiciary or administration of justice; or any such Justice or Judge may be involuntarily retired for disability seriously interfering with the performance of his duties, which is, or is likely to become, permanent in nature.";

in subsec. (7), substituted "persons holding an office named in Paragraph A of Subsection (6) of this Section" for "Justices or Judges"; rewrote subsec. (8) which prior thereto read:

"The Commission may, after such investigation as it deems necessary, order a hearing to be held before it concerning the removal or retirement of a Justice or Judge, or it may in its discretion request the Supreme Court to appoint an active or retired District Judge or Justice of a Court of Civil Appeals as a Master to hear and take evidence in any such matter, and to report thereon to the Commission. If, after hearing, or after considering the record and report of a Master, the Commission finds good cause therefore, it shall recommend to the Supreme Court the removal or retirement, as the case may be, of the Justice or Judge in question and shall thereupon file with the Clerk of the Supreme Court the entire record before the Commission.";

in subsec. (9) substituted "public censure, retirement or removal" for "removal or retirement"; in subsec. (11) substi-

tuted "person holding an office named in Paragraph A of Subsection (6) of this Section" for "judge" and inserted "or removal" preceding "due process of law", in the first sentence; in subsec. (12), substituted "person holding an office named in Paragraph A of Subsection (6) of this Section" for "Justice or Judge"; and in subsec. (13) substituted "persons holding an office named in Paragraph A of Subsection (6) of this Section" for "Justices and Judges".

The 1977 amendment proposed by Acts 1977, 65th Leg., p. 3362, S.J.R. No. 30 and adopted at the Nov. 8, 1977 election, rewrote subsec. (2), which prior thereto read:

"There is hereby created the State Judicial Qualifications Commission, to consist of nine (9) members, to wit: (i) two (2) Justices of Courts of Civil Appeals; (ii) two (2) District Judges; (iii) two (2) members of the State Bar, who have respectively practiced as such for over ten (10) consecutive years next preceding their selection; (iii) three (3) citizens, at least thirty (30) years of age, not licensed to practice law nor holding any salaried public office or employment; provided that no person shall be or remain a member of the Commission, who does not maintain physical residence within this State, or who resides in, or holds a judgeship within or for, the same Supreme Judicial District as another member of the Commission, or who shall have ceased to retain the qualifications above specified for his respective class of membership. Commissioners of classes (i) and (ii) above shall be chosen by the Supreme Court with advice and consent of the Senate, those of class (iii) by the Board of Directors of the State Bar under regulations to be prescribed by the Supreme Court with advice and consent of the Senate, and those of class (iii) by appointment of the Governor with advice and consent of the Senate.";

in subsec. (5), substituted "six (6) members" for five (5) members", and inserted "suspension"; rewrote par. A of subsec. (6), which prior thereto read:

"Any Justice or Judge of the Appellate Courts and District and Criminal District Courts, any County Judge, and any Judge of a County Court at Law, a Court of Domestic Relations, a Juvenile Court, a Probate Court, or a Corporation or Municipal Court, and any Justice of the Peace, and any Judge or presiding officer of any special court created by the Legislature as provided in Section 1, Article V, of this Constitution, may, subject to the other provisions hereof, be removed from office for willful or persistent conduct, which is clearly inconsistent with the proper performance of his said duties or casts public discredit upon the judiciary or administration of justice; or any person holding such office may be censured, in lieu of removal from office, under procedures provided for by the Legislature.";

in subsec. (7), added "or by a Master"; in subsec. (8), in the first sentence, inserted "or public reprimand", "institute formal proceedings", "formal hearing", "public censure", "or retired Judge or Justice of the Court of Criminal Appeals or the Supreme Court", added the second sentence which related to the powers of the Master, and inserted "formal hearing" in the last sentence; in subsec. (9), added the sentence which allowed the Supreme Court in an order for involuntary retirement, disability, or removal to prohibit such person from holding future judicial office; in subsec. (10), in the first sentence, inserted ", unless otherwise provided by law", time, and added the sentence which allowed the Commission to issue a public statement when sources cause notoriety concerning a Judge or Commission itself and the best interests of a Judge or of the public will be served; and rewrote subsec. (12) which prior thereto read:

"No person holding an office named in Paragraph A of Subsection (6) of this Section shall sit as a member of the Commission or Supreme Court in any proceeding involving his own retirement or removal."

The 1984 amendment proposed by Acts 1983, 68th Leg., p. 6694, H.J.R. No. 4, §§ 1 to 4 and adopted at the Nov. 6, 1984 election, effective Jan. 1, 1985, in subsec. (2) substituted "one (1) Justice of a Court of Appeals" for "two (2) Justices of Courts of Civil Appeals", "one (1) District Judge" for "two (2) District Judges", inserted "(vi) one (1) Judge of a Municipal Court; and (vii) one (1) Judge of a County Court at Law; inserted "and the Judges of a Municipal Court and or a County Court at Law", inserted "classes (i), (ii), and (vii), substituted "commissioner of classes (v) and (vi) by appointment of the Supreme Court as provided by law, with the advice and consent of the

Senate" for "commissioner of class (v) by appointment of the Supreme Court, deleted "from a list of five (5) names submitted by the executive committee of the Justice of the Peace and Constables Association of Texas, with the advice and consent of the Senate."; and deleted the remaining sentences which related to the termination of the initial term of the commissioner on November 19, 1979 and the continuation of the office as a member of the Commission for the appointed term on the effective date of this amendment, and other nonsubstantive grammatical changes; rewrote par. A of subsec. (6) which prior thereto read:

"Any Justice or Judge of the Appellate Courts and District and Criminal District Courts, and any County Judge, and any Judge of a County Court at law, a Court of Domestic Relations, a Juvenile Court, a Probate Court, or a Corporation or Municipal Court, and any Justice of the Peace, and any Judge or presiding officer of any special court created by the Legislature as provided in Section 1, Article V, of this Constitution, may, subject to the other provisions hereof, be removed from office for willful or persistent conduct, which is clearly inconsistent with the proper performance of his said duties or casts public discredit upon the judiciary or administration of justice, or any person holding such office may be censured, in lieu of removal from office, under procedures provided for by the Legislature. Any person holding an office named in this subsection may be suspended from office with or without pay by the Commission immediately on being indicted by a State or Federal grand jury for a felony offense, or, on the filing of a sworn complaint charging a person holding such office with willful and persistent conduct which is clearly inconsistent with the proper performance of his duties or which casts public discredit on the judiciary or on the administration of justice, the Commission, after giving the person notice and an opportunity to appear before the Commission, may recommend to the Supreme Court the suspension of such person from office. The Supreme Court, after considering the record of such appearance and the recommendation of the Commission, may suspend the person from office with or without pay, pending final disposition of the charge."

and added par. C; in subsec. (8), inserted "admonition, warning, reprimand, or requirement that the person obtain additional training or education," substituted "or position specified" for "named in Paragraph A of", substituted "Court of Appeals" for "Court of Civil Appeals", substituted "a review tribunal" for "the Supreme Court", substituted "or position specified" for "named in Paragraph A of" and substituted "tribunal" for "Clerk of the Supreme Court"; rewrote subsec. (9) which prior thereto read:

"The Supreme Court shall review the record of the proceedings on the law and facts and in its discretion may, for good cause shown, permit the introduction of additional evidence and shall order public censure, retirement or removal, as it finds just and proper, or wholly reject the recommendation. Upon an order for involuntary retirement for disability or an order for removal, the office in question shall become vacant. The Supreme Court, in an order for involuntary retirement for disability or an order for removal, may prohibit such person from holding judicial office in the future. The rights of an incumbent so retired to retirement benefits shall be the same as if his retirement had been voluntary.";

in subsec. (10), substituted "or a Master shall be privileged, unless otherwise provided by law" for "Master or the Supreme Court shall be privileged, unless otherwise provided by law, provided that upon being filed in the Supreme Court the record loses its confidential character; in subsec. (11), inserted "review tribunal" twice, inserted "shall provide the right of discovery of evidence to a Justice, Judge, Master, or Magistrate after formal proceedings are instituted and", and substituted "or position specified" for "named in Paragraph A of" twice; in subsec. (12) substituted "office specified in Subsection (6)" for "named in Paragraph A of Subsection (6)", inserted "discipline" and deleted the last sentence which provided that a recommendation of the Commission for the suspension, censure, retirement, or removal of a Supreme Court Justice shall be determined by a tribunal of seven Court of Civil Appeals Justices; and added subsec. (14).

Section 5 of H.J.R. No. 4, Acts 1983, 68th Leg., p. 6700, contained a temporary provision relating to initial terms of certain commissioners, continuation of existing terms, abolishment of the offices of certain commissioners, and the application of the constitutional amendment to existing investigations and formal proceedings. The temporary provision expired January 1, 1988.

The 2001 amendment, proposed by Acts 2001, 77th Leg., H.J.R. No. 75, § 2.01 and adopted at the Nov. 6, 2001 election, in subd. (1), in the second sentence, following "the Legislature may prescribe", deleted "but, in the case of an incumbent whose term of office includes the effective date of this Amendment, this provision shall not prevent him from serving the remainder of said term nor be applicable to him before his period or periods of judicial service shall have reached a total of ten (10) years"; and in subd. (2), in the first sentence, substituted "The State Commission on Judicial Conduct consists" for "The name of the State Judicial Qualifications Commission is changed to the State Commission on Judicial Conduct. The Commission consists".

The 2005 amendment, proposed by Acts 2005, 79th Leg., H.J.R. No. 87 and adopted at the Nov. 8, 2005 election, rewrote subd. (2) and in subd. (5) twice substituted "seven (7) members" for "six (6) members". Prior to amendment, subd. (2) read:

"The State Commission on Judicial Conduct consists of eleven (11) members, to wit: (i) one (1) Justice of a Court of Appeals; (ii) one (1) District Judge; (iii) two (2) members of the State Bar, who have respectively practiced as such for over ten (10) consecutive years next preceding their selection; (iiii) four (4) citizens, at least thirty (30) years of age, not licensed to practice law nor holding any salaried public office or employment; (v) one (1) Justice of the Peace; (vi) one (1) Judge of a Municipal Court; and, (vii) one (1) Judge of a County Court at Law; provided that no person shall be or remain a member of the Commission, who does not maintain physical residence within this State, or who resides in, or holds a judgeship within or for, the same Supreme Judicial District as another member of the Commission, or who shall have ceased to retain the qualifications above specified for his respective class of membership, except that the Justice of the Peace and the Judges of a Municipal Court and or a County Court at Law shall be selected at large without regard to whether they reside or hold a judgeship in the same Supreme Judicial District as another member of the Commission. Commissioners of classes (i), (ii), and (vii) above shall be chosen by the Supreme Court with advice and consent of the Senate, those of class (iii) by the Board of Directors of the State Bar under regulations to be prescribed by the Supreme Court with advice and consent of the Senate, those of class (iiii) by appointment of the Governor with advice and consent of the Senate, and the commissioners of classes (v) and (vi) by appointment of the Supreme Court as provided by law, with the advice and consent of the Senate."

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The 2007 amendment, proposed by Acts 2007, 80th Leg., H.J.R. No. 36, was approved at the Nov. 6, 2007 election, and rewrote subd. (1), which prior thereto read:

"(1) Subject to the further provisions of this Section, the Legislature shall provide for the retirement and compensation of Justices and Judges of the Appellate Courts and District and Criminal District Courts on account of length of service, age and disability, and for their reassignment to active duty where and when needed. The office of every such Justice and Judge shall become vacant when the incumbent reaches the age of seventy-five (75) years or such earlier age, not less than seventy (70) years, as the Legislature may prescribe."

Appendix H

GOVERNMENT CODE CHAPTER 33. STATE COMMISSION ON JUDICIAL CONDUCT

GOVERNMENT CODE

TITLE 2. JUDICIAL BRANCH

SUBTITLE B. JUDGES

CHAPTER 33. STATE COMMISSION ON JUDICIAL CONDUCT

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 33.001. DEFINITIONS. (a) In this chapter:

(1) "Censure" means an order of denunciation issued by the commission under Section 1-a(8), Article V, Texas Constitution, or an order issued by a review tribunal under Section 1-a(9), Article V, Texas Constitution.

(2) "Chairperson" means the member of the commission selected by the members of the commission to serve as its presiding officer.

(3) "Clerk" means the individual designated by the commission to assist in:

(A) formal proceedings before the commission or a special master; or

(B) proceedings before a special court of review.

(4) "Commission" means the State Commission on Judicial Conduct.

(5) "Examiner" means an individual, including an employee or special counsel of the commission, appointed by the commission to gather and present evidence before a special master, the commission, a special court of review, or a review tribunal.

(6) "Formal hearing" means the public evidentiary phase of formal proceedings conducted before the commission or a special master.

(7) "Formal proceedings" means the proceedings ordered by the commission concerning the public censure, removal, or retirement of a judge.

(8) "Judge" means a justice, judge, master, magistrate, or retired or former judge as described by Section 1-a, Article V, Texas Constitution, or other person who performs the functions of the justice, judge, master, magistrate, or retired or

former judge.

(9) "Review tribunal" means a panel of seven justices of the courts of appeal selected by lot by the chief justice of the supreme court to review a recommendation of the commission for the removal or retirement of a judge under Section 1-a(9), Article V, Texas Constitution.

(10) "Sanction" means an order issued by the commission under Section 1-a(8), Article V, Texas Constitution, providing for a private or public admonition, warning, or reprimand or requiring that a person obtain additional training or education.

(11) "Special court of review" means a panel of three justices of the courts of appeal selected by lot by the chief justice of the supreme court on petition to review a censure or sanction issued by the commission under Section 1-a(8), Article V, Texas Constitution.

(12) "Special master" means a master appointed by the supreme court under Section 1-a, Article V, Texas Constitution.

(b) For purposes of Section 1-a, Article V, Texas Constitution, "wilful or persistent conduct that is clearly inconsistent with the proper performance of a judge's duties" includes:

(1) wilful, persistent, and unjustifiable failure to timely execute the business of the court, considering the quantity and complexity of the business;

(2) wilful violation of a provision of the Texas penal statutes or the Code of Judicial Conduct;

(3) persistent or wilful violation of the rules promulgated by the supreme court;

(4) incompetence in the performance of the duties of the office;

(5) failure to cooperate with the commission; or

(6) violation of any provision of a voluntary agreement to resign from judicial office in lieu of disciplinary action by the commission.

(c) The definitions provided by Subsections (b) and (d) are not exclusive.

(d) For purposes of Subdivision (6), Section 1-a, Article V,

Texas Constitution, a misdemeanor involving official misconduct includes a misdemeanor involving an act relating to a judicial office or a misdemeanor involving an act involving moral turpitude. Acts 1985, 69th Leg., ch. 480, Sec. 1, eff. Sept. 1, 1985. Amended by Acts 1999, 76th Leg., ch. 462, Sec. 1, eff. June 18, 1999; Acts 2001, 77th Leg., ch. 917, Sec. 1, eff. Sept. 1, 2001.

Amended by:

Acts 2009, 81st Leg., R.S., Ch. 805, Sec. 1, eff. June 19, 2009.

Sec. 33.002. COMMISSION. (a) The State Commission on Judicial Conduct is established under Section 1-a, Article V, Texas Constitution, and has the powers provided by that section.

(b) A constitutional or statutory reference to the State Judicial Qualifications Commission means the State Commission on Judicial Conduct.

(c) Appointments to the commission shall be made without regard to the race, color, disability, sex, religion, age, or national origin of the appointees.

Acts 1985, 69th Leg., ch. 480, Sec. 1, eff. Sept. 1, 1985. Amended by Acts 1999, 76th Leg., ch. 462, Sec. 2, eff. June 18, 1999; Acts 2001, 77th Leg., ch. 917, Sec. 2, eff. Sept. 1, 2001.

Sec. 33.003. SUNSET PROVISION. The State Commission on Judicial Conduct is subject to review under Chapter 325 (Texas Sunset Act), but is not abolished under that chapter. The commission shall be reviewed during the period in which state agencies abolished in 2001 and every 12th year after 2001 are reviewed.

Acts 1985, 69th Leg., ch. 480, Sec. 1, eff. Sept. 1, 1985. Amended by Acts 1985, 69th Leg., ch. 480, Sec. 21, eff. Sept. 1, 1985; Acts 1987, 70th Leg., ch. 148, Sec. 2.47(a), eff. Sept. 1, 1987; Acts 1991, 72nd Leg., 1st C.S., ch. 17, Sec. 5.13, eff. Nov. 12, 1991.

Sec. 33.0032. CONFLICT OF INTEREST. (a) In this section, "Texas trade association" means a cooperative and voluntarily joined association of business or professional competitors in this

state designed to assist its members and its industry or profession in dealing with mutual business or professional problems and in promoting their common interest.

(b) A person may not be a commission employee employed in a "bona fide executive, administrative, or professional capacity," as that phrase is used for purposes of establishing an exemption to the overtime provisions of the federal Fair Labor Standards Act of 1938 (29 U.S.C. Section 201 et seq.), and its subsequent amendments, if:

(1) the person is an officer, employee, or paid consultant of a Texas trade association the members of which are subject to regulation by the commission; or

(2) the person's spouse is an officer, manager, or paid consultant of a Texas trade association the members of which are subject to regulation by the commission.

(c) A person may not act as the general counsel to the commission if the person is required to register as a lobbyist under Chapter 305 because of the person's activities for compensation on behalf of a profession related to the operation of the commission. Added by Acts 2001, 77th Leg., ch. 917, Sec. 3, eff. Sept. 1, 2001.

Sec. 33.004. COMPENSATION AND EXPENSES OF COMMISSION MEMBERS, SPECIAL MASTERS, AND OTHER EMPLOYEES. (a) A member of the commission serves without compensation for services, but is entitled to reimbursement for expenses as provided by this section.

(b) A special master who is an active district judge or justice of the court of appeals is entitled to a per diem of \$25 for each day or part of a day that the person spends in the performance of the duties of special master. The per diem is in addition to other compensation and expenses authorized by law.

(c) A special master who is a retired judge of a district court or the court of criminal appeals or a retired justice of a court of appeals or the supreme court is entitled to compensation in the same manner as provided by Section 74.061. For purposes of this subsection, the term "court" in Section 74.061(c) means the district court in the county in which formal proceedings are heard by the special master.

(d) A member or employee of the commission, special counsel, or any other person appointed by the commission to assist the commission in performing the duties of the commission, or a special master is entitled to necessary expenses for travel, board, and lodging incurred in the performance of official duties.

(e) Payment shall be made under this section on certificates of approval by the commission.

Acts 1985, 69th Leg., ch. 480, Sec. 1, eff. Sept. 1, 1985. Amended by Acts 2001, 77th Leg., ch. 917, Sec. 4, eff. Sept. 1, 2001.

Amended by:

Acts 2009, 81st Leg., R.S., Ch. 807, Sec. 1, eff. September 1, 2009.

Acts 2009, 81st Leg., R.S., Ch. 807, Sec. 2, eff. September 1, 2009.

Sec. 33.0041. REMOVAL OF COMMISSION MEMBER; NOTIFICATION PROCEDURES. If the executive director has knowledge that a potential ground for removal of a commission member exists, the executive director shall notify the presiding officer of the commission of the potential ground. The presiding officer shall then notify the governor, the supreme court, the state bar, and the attorney general that a potential ground for removal exists. If the potential ground for removal involves the presiding officer, the executive director shall notify the next highest ranking officer of the commission, who shall then notify the governor, the supreme court, the state bar, and the attorney general that a potential ground for removal exists.

Added by Acts 2001, 77th Leg., ch. 917, Sec. 5, eff. Sept. 1, 2001.

Sec. 33.0042. REQUIREMENTS FOR OFFICE OR EMPLOYMENT: INFORMATION. The executive director or the executive director's designee shall provide to members of the commission and to agency employees, as often as necessary, information regarding the requirements for office or employment under this chapter and Section 1-a, Article V, Texas Constitution, including information regarding a person's responsibilities under applicable laws relating to standards of conduct for state officers or employees.

Added by Acts 2001, 77th Leg., ch. 917, Sec. 5, eff. Sept. 1, 2001.

Sec. 33.0043. COMMISSION MEMBER TRAINING. (a) A person who is appointed to and qualifies for office as a member of the commission shall complete a training program that complies with this section.

(b) The training program must provide the person with information regarding:

- (1) the legislation that created the commission;
- (2) the programs operated by the commission;
- (3) the role and functions of the commission;
- (4) the rules of the commission with an emphasis on the rules that relate to disciplinary and investigatory authority;
- (5) the current budget for the commission;
- (6) the results of the most recent formal audit of the commission;
- (7) the requirements of laws relating to public officials, including conflict-of-interest laws; and
- (8) any applicable ethics policies adopted by the commission or the Texas Ethics Commission.

(c) A person appointed to the commission is entitled to reimbursement, as provided by the General Appropriations Act, for the travel expenses incurred in attending the training program regardless of whether the attendance at the program occurs before or after the person qualifies for office.

Added by Acts 2001, 77th Leg., ch. 917, Sec. 5, eff. Sept. 1, 2001.

Sec. 33.0044. DIVISION OF RESPONSIBILITY. The commission shall develop and implement policies that clearly separate the policy-making responsibilities of the commission and the management responsibilities of the executive director and staff of the commission.

Added by Acts 2001, 77th Leg., ch. 917, Sec. 5, eff. Sept. 1, 2001.

Sec. 33.0045. EQUAL EMPLOYMENT OPPORTUNITY POLICY STATEMENT. (a) The executive director or the executive director's designee shall prepare and maintain a written policy

statement that implements a program of equal employment opportunity to ensure that all personnel decisions are made without regard to race, color, disability, sex, religion, age, or national origin.

(b) The policy statement must include:

(1) personnel policies, including policies relating to recruitment, evaluation, selection, training, and promotion of personnel, that show the intent of the commission to avoid the unlawful employment practices described by Chapter 21, Labor Code; and

(2) an analysis of the extent to which the composition of the commission's personnel is in accordance with state and federal law and a description of reasonable methods to achieve compliance with state and federal law.

(c) The policy statement must:

(1) be updated annually;

(2) be reviewed by the state Commission on Human Rights for compliance with Subsection (b)(1); and

(3) be filed with the governor's office.

Added by Acts 2001, 77th Leg., ch. 917, Sec. 5, eff. Sept. 1, 2001.

Sec. 33.005. ANNUAL REPORT. (a) Not later than December 1 of each year, the commission shall submit to the legislature a report for the preceding fiscal year ending August 31.

(b) The report must include:

(1) an explanation of the role of the commission;

(2) annual statistical information and examples of improper judicial conduct;

(3) an explanation of the commission's processes; and

(4) changes the commission considers necessary in its rules or the applicable statutes or constitutional provisions.

(c) The commission shall distribute the report to the governor, lieutenant governor, speaker of the house of representatives, and editor of the Texas Bar Journal.

(d) The legislature shall appropriate funds for the preparation and distribution of the report.

(e) The Texas Bar Journal shall periodically publish public statements, sanctions, and orders of additional education issued by

the commission.

Acts 1985, 69th Leg., ch. 480, Sec. 1, eff. Sept. 1, 1985. Amended by Acts 1989, 71st Leg., ch. 646, Sec. 3, eff. Aug. 28, 1989; Acts 1999, 76th Leg., ch. 462, Sec. 3, eff. June 18, 1999; Acts 2001, 77th Leg., ch. 917, Sec. 6, eff. Sept. 1, 2001.

Sec. 33.006. IMMUNITY FROM LIABILITY. (a) This section applies to:

- (1) the commission;
- (2) a member of the commission;
- (3) the executive director of the commission;
- (4) an employee of the commission;
- (5) a special master appointed under Section 1-a(8), Article V, Texas Constitution;
- (6) special counsel for the commission and any person employed by the special counsel; and
- (7) any other person appointed by the commission to assist the commission in performing its duties.

(b) A person to which this section applies is not liable for an act or omission committed by the person within the scope of the person's official duties.

(c) The immunity from liability provided by this section is absolute and unqualified and extends to any action at law or in equity.

Added by Acts 1999, 76th Leg., ch. 462, Sec. 4, eff. June 18, 1999. Amended by Acts 2001, 77th Leg., ch. 917, Sec. 7, eff. Sept. 1, 2001.

Sec. 33.007. DISTRIBUTION OF MATERIALS TO JUDGES AND THE PUBLIC. (a) The commission shall develop and distribute plain-language materials as described by this section to judges and the public.

- (b) The materials must include a description of:
- (1) the commission's responsibilities;
 - (2) the types of conduct that constitute judicial misconduct;
 - (3) the types of sanctions issued by the commission,

including orders of additional education; and

(4) the commission's policies and procedures relating to complaint investigation and resolution.

(c) The materials shall be provided in English and Spanish.

(d) The commission shall provide to each person filing a complaint with the commission the materials described by this section.

(e) The commission shall adopt a policy to effectively distribute materials as required by this section.

Added by Acts 2001, 77th Leg., ch. 917, Sec. 8, eff. Sept. 1, 2001.

Sec. 33.008. JUDICIAL MISCONDUCT INFORMATION. The commission shall routinely provide to entities that provide education to judges information relating to judicial misconduct resulting in sanctions or orders of additional education issued by the commission. The commission shall categorize the information by level of judge and type of misconduct.

Added by Acts 2001, 77th Leg., ch. 917, Sec. 8, eff. Sept. 1, 2001.

SUBCHAPTER B. POWERS AND DUTIES

Sec. 33.021. GENERAL POWERS OF COMMISSION. The commission may:

(1) design and use a seal;

(2) employ persons that it considers necessary to carry out the duties and powers of the commission;

(3) employ special counsel as it considers necessary;

(4) arrange for attendance of witnesses;

(5) arrange for and compensate expert witnesses and reporters; and

(6) pay from its available funds the reasonably necessary expenses of carrying out its duties under the constitution, including providing compensation to special masters.

Acts 1985, 69th Leg., ch. 480, Sec. 1, eff. Sept. 1, 1985. Amended by Acts 1999, 76th Leg., ch. 462, Sec. 5, eff. June 18, 1999; Acts 2001, 77th Leg., ch. 917, Sec. 10, eff. Sept. 1, 2001.

Sec. 33.0211. COMPLAINTS. (a) The commission shall maintain a file on each written complaint filed with the commission. The file must include:

- (1) the name of the person who filed the complaint;
- (2) the date the complaint is received by the commission;
- (3) the subject matter of the complaint;
- (4) the name of each person contacted in relation to the complaint;
- (5) a summary of the results of the review or investigation of the complaint; and
- (6) an explanation of the reason the file was closed, if the commission closed the file without taking action other than to investigate the complaint.

(b) The commission, at least quarterly until final disposition of the complaint, shall notify the person filing the complaint of the status of the investigation unless the notice would jeopardize an undercover investigation.

Added by Acts 2001, 77th Leg., ch. 917, Sec. 11, eff. Sept. 1, 2001.

Sec. 33.022. INVESTIGATIONS AND FORMAL PROCEEDINGS.

(a) The commission may conduct a preliminary investigation of the circumstances surrounding an allegation or appearance of misconduct or disability of a judge to determine if the allegation or appearance is unfounded or frivolous.

(b) If, after conducting a preliminary investigation under this section, the commission determines that an allegation or appearance of misconduct or disability is unfounded or frivolous, the commission shall terminate the investigation.

(c) If, after conducting a preliminary investigation under this section, the commission does not determine that an allegation or appearance of misconduct or disability is unfounded or frivolous, the commission:

- (1) shall:

(A) conduct a full investigation of the circumstances surrounding the allegation or appearance of misconduct or disability; and

(B) notify the judge in writing of:

(i) the commencement of the investigation;

and

(ii) the nature of the allegation or appearance of misconduct or disability being investigated; and

(2) may:

(A) order the judge to:

(i) submit a written response to the allegation or appearance of misconduct or disability; or

(ii) appear informally before the commission;

(B) order the deposition of any person; or

(C) request the complainant to appear informally before the commission.

(d) The commission shall serve an order issued by the commission under Subsection (c)(2)(B) on the person who is the subject of the deposition and the judge who is the subject of the investigation. The order must be served within a reasonable time before the date of the deposition.

(e) The commission may file an application in a district court to enforce an order issued by the commission under Subsection (c)(2)(B).

(f) The commission shall notify the judge in writing of the disposition of a full investigation conducted by the commission under this section.

(g) If after the investigation has been completed the commission concludes that formal proceedings will be instituted, the matter shall be entered in a docket to be kept for that purpose and written notice of the institution of formal proceedings shall be served on the judge without delay. The proceedings shall be entitled:

"Before the State Commission on Judicial Conduct
Inquiry Concerning a Judge, No. ____"

(h) The notice shall specify in ordinary and concise language the charges against the judge and the alleged facts on which the charges are based and the specific standards contended to have been violated. The judge is entitled to file a written answer.

to the charges against the judge not later than the 15th day after the notice is served on the judge, and the notice shall so advise the judge.

(i) The notice shall be served on the judge or the judge's attorney of record by personal service of a copy of the notice by a person designated by the chairperson. The person serving the notice shall promptly notify the clerk in writing of the date on which the notice was served. If it appears to the chairperson on affidavit that, after reasonable effort during a period of 10 days, personal service could not be had, service may be made by mailing by registered or certified mail copies of the notice addressed to the judge at the judge's chambers or at the judge's last known residence in an envelope marked "personal and confidential." The date of mailing shall be entered in the docket.

(j) A judge at the judge's request may elect to have any hearing open to the public or to persons designated by the judge. The right of a judge to an open hearing does not preclude placing witnesses under the rule as provided by the Texas Rules of Civil Procedure.

(k) A judge is not entitled to a jury trial in formal proceedings before a special master or the commission.

(l) The commission shall adopt procedures for hearing from judges and complainants appearing before the commission. The procedures shall ensure the confidentiality of a complainant's identity as provided under Section 33.0321.

Acts 1985, 69th Leg., ch. 480, Sec. 1, eff. Sept. 1, 1985. Amended by Acts 1987, 70th Leg., ch. 486, Sec. 1, eff. Aug. 31, 1987; Acts 1993, 73rd Leg., ch. 596, Sec. 1, 2, eff. Sept. 1, 1993; Acts 1999, 76th Leg., ch. 462, Sec. 6, eff. June 18, 1999; Acts 2001, 77th Leg., ch. 917, Sec. 12, eff. Sept. 1, 2001.

Sec. 33.023. PHYSICAL OR MENTAL INCAPACITY OF JUDGE.

(a) In any investigation or proceeding that involves the physical or mental incapacity of a judge, the commission may order the judge to submit to a physical or mental examination by one or more qualified physicians or a mental examination by one or more qualified psychologists selected and paid for by the commission.

(b) The commission shall give the judge written notice of the examination not later than 10 days before the date of the examination. The notice must include the physician's name and the date, time, and place of the examination.

(c) Each examining physician shall file a written report of the examination with the commission and the report shall be received as evidence without further formality. On request of the judge or the judge's attorney, the commission shall give the judge a copy of the report. The physician's oral or deposition testimony concerning the report may be required by the commission or by written demand of the judge.

(d) If a judge refuses to submit to a physical or mental examination ordered by the commission under this section, the commission may petition a district court for an order compelling the judge to submit to the physical or mental examination.

Acts 1985, 69th Leg., ch. 480, Sec. 1, eff. Sept. 1, 1985. Amended by Acts 1999, 76th Leg., ch. 462, Sec. 7, eff. June 18, 1999; Acts 2001, 77th Leg., ch. 917, Sec. 13, eff. Sept. 1, 2001.

Sec. 33.024. OATHS AND SUBPOENAS. In conducting an investigation, formal proceedings, or proceedings before a special court of review, a commission member, special master, or member of a special court of review may:

- (1) administer oaths;
- (2) order and provide for inspection of books and records; and
- (3) issue a subpoena for attendance of a witness or production of papers, books, accounts, documents, and testimony relevant to the investigation or proceeding.

Acts 1985, 69th Leg., ch. 480, Sec. 1, eff. Sept. 1, 1985. Amended by Acts 1999, 76th Leg., ch. 462, Sec. 8, eff. June 18, 1999.

Sec. 33.025. ENFORCEMENT OF SUBPOENA. (a) The commission may file an application in a district court or, if appropriate, with a special master or special court of review, to enforce a subpoena issued by the commission under this chapter.

(b) A special master or special court of review may enforce

by contempt a subpoena issued by the commission, the special master, or the special court of review.

Acts 1985, 69th Leg., ch. 480, Sec. 1, eff. Sept. 1, 1985. Amended by Acts 1999, 76th Leg., ch. 462, Sec. 9, eff. June 18, 1999.

Sec. 33.026. WITNESS IMMUNITY. (a) In a proceeding or deposition related to a proceeding before the commission, a special master, or a special court of review, the commission, special master, or special court of review may compel a person other than the judge to testify or produce evidence over the person's claim of privilege against self-incrimination.

(b) A person compelled to testify over a proper claim of privilege against self-incrimination is not subject to indictment or prosecution for a matter or transaction about which the person truthfully testifies or produces evidence.

(c) A special master has the same powers as a district judge in matters of contempt and granting immunity.

Acts 1985, 69th Leg., ch. 480, Sec. 1, eff. Sept. 1, 1985. Amended by Acts 1999, 76th Leg., ch. 462, Sec. 10, eff. June 18, 1999.

Sec. 33.027. DISCOVERY. (a) In formal proceedings or in a proceeding before a special court of review, discovery shall be conducted, to the extent practicable, in the manner provided by the rules applicable to civil cases generally.

(b) On request, a special master, the commission, or a special court of review shall expedite the discovery in formal proceedings or in a proceeding before a special court of review.

(c) The following may not be the subject of a discovery request in formal proceedings or in a proceeding before a special court of review:

(1) the discussions, thought processes, or individual votes of members of the commission;

(2) the discussions or thought processes of employees of the commission, including special counsel for the commission; or

(3) the identity of a complainant or informant if the person requests that the person's identity be kept confidential.

Acts 1985, 69th Leg., ch. 480, Sec. 1, eff. Sept. 1, 1985. Amended by Acts 1999, 76th Leg., ch. 462, Sec. 11, eff. June 18, 1999.

Sec. 33.028. PROCESS AND ORDERS. (a) Process issued under this chapter is valid anywhere in the state.

(b) A peace officer, an employee of the commission, or any other person whom the commission, a special master, or a special court of review designates may serve process or execute a lawful order of the commission, the special master, or the special court of review.

Acts 1985, 69th Leg., ch. 480, Sec. 1, eff. Sept. 1, 1985. Amended by Acts 1999, 76th Leg., ch. 462, Sec. 12, eff. June 18, 1999.

Sec. 33.029. WITNESSES' EXPENSES. A witness called to testify by the commission other than an officer or employee of the state or a political subdivision or court of the state is entitled to the same mileage expenses and per diem as a witness before a state grand jury. The commission shall pay these amounts from its appropriated funds.

Acts 1985, 69th Leg., ch. 480, Sec. 1, eff. Sept. 1, 1985. Amended by Acts 1999, 76th Leg., ch. 462, Sec. 13, eff. June 18, 1999.

Sec. 33.030. ASSISTANCE TO COMMISSION, SPECIAL MASTER, OR SPECIAL COURT OF REVIEW. (a) On request of the commission, the attorney general shall act as its counsel generally or in a particular investigation or proceeding.

(b) A state or local government body or department, an officer or employee of a state or local government body, or an official or agent of a state court shall cooperate with and give reasonable assistance and information to the commission, an authorized representative of the commission, a special master, or a special court of review concerning an investigation or proceeding before the commission, special master, or special court of review.

Acts 1985, 69th Leg., ch. 480, Sec. 1, eff. Sept. 1, 1985. Amended by Acts 1999, 76th Leg., ch. 462, Sec. 14, eff. June 18, 1999.

Sec. 33.031. NO AWARD OF COSTS. Court costs or attorney's

fees may not be awarded in a proceeding under this chapter.

Acts 1985, 69th Leg., ch. 480, Sec. 1, eff. Sept. 1, 1985. Amended by Acts 1999, 76th Leg., ch. 462, Sec. 15, eff. June 18, 1999.

Sec. 33.032. CONFIDENTIALITY OF PAPERS, RECORDS, AND PROCEEDINGS. (a) Except as otherwise provided by this section and Section 33.034, the papers filed with and proceedings before the commission are confidential prior to the filing of formal charges.

(b) The formal hearing and any evidence introduced during the formal hearing, including papers, records, documents, and pleadings filed with the clerk, shall be public.

(c) On issuance of a public admonition, warning, reprimand, or public requirement that a person obtain additional training or education by the commission, the record of the informal appearance and the documents presented to the commission during the informal appearance that are not protected by attorney-client or work product privilege shall be public.

(d) The disciplinary record of a judge, including any private sanctions, is admissible in a subsequent proceeding before the commission, a special master, a special court of review, or a review tribunal.

(e) On the filing of a written request by a judge, the commission may release to the person designated in the request, including the judge, the number, nature, and disposition of a complaint filed against the judge with the commission, except that the commission may refuse to release the identity of a complainant.

(f) The commission may release to the Office of the Chief Disciplinary Counsel of the State Bar of Texas information indicating that an attorney, including a judge who is acting in the judge's capacity as an attorney, has violated the Texas Disciplinary Rules of Professional Conduct.

(g) If the commission issues an order suspending a judge who has been indicted for a criminal offense, the order, any withdrawal of the order, and all records and proceedings related to the suspension shall be public.

(h) A voluntary agreement to resign from judicial office in lieu of disciplinary action by the commission shall be public on the

commission's acceptance of the agreement. The agreement and any agreed statement of facts relating to the agreement are admissible in a subsequent proceeding before the commission. An agreed statement of facts may be released to the public only if the judge violates a term of the agreement.

Acts 1985, 69th Leg., ch. 480, Sec. 1, eff. Sept. 1, 1985. Amended by Acts 1987, 70th Leg., ch. 486, Sec. 2, eff. Aug. 31, 1987; Acts 1987, 70th Leg., 2nd C.S., ch. 47, Sec. 1, eff. Oct. 20, 1987; Acts 1999, 76th Leg., ch. 462, Sec. 16, eff. June 18, 1999; Acts 2001, 77th Leg., ch. 917, Sec. 14, eff. Sept. 1, 2001.

Sec. 33.0321. CONFIDENTIALITY OF COMPLAINANT'S IDENTITY.

On the request of a complainant, the commission may keep the complainant's identity confidential.

Added by Acts 2001, 77th Leg., ch. 917, Sec. 15, eff. Sept. 1, 2001.

Sec. 33.033. NOTIFICATION TO COMPLAINANT. (a) The commission shall promptly notify a complainant of the disposition of the case.

(b) The communication shall inform the complainant that:

- (1) the case has been dismissed;
- (2) a private sanction or order of additional education has been issued by the commission;
- (3) a public sanction has been issued by the commission;
- (4) formal proceedings have been instituted; or
- (5) a judge has resigned from judicial office in lieu of disciplinary action by the commission.

(c) The communication may not contain the name of a judge unless a public sanction has been issued by the commission or formal proceedings have been instituted.

(d) If a public sanction has been issued by the commission, the communication must include a copy of the public sanction.

(e) If the complaint is dismissed by the commission, the commission shall include in the notification under Subsection (a):

- (1) an explanation of each reason for the dismissal;

and

(2) information relating to requesting reconsideration of the dismissed complaint as provided by Sections 33.035(a) and (f).

Acts 1985, 69th Leg., ch. 480, Sec. 1, eff. Sept. 1, 1985. Amended by Acts 1987, 70th Leg., ch. 486, Sec. 3, eff. Aug. 31, 1987; Acts 1999, 76th Leg., ch. 462, Sec. 17, eff. June 18, 1999; Acts 2001, 77th Leg., ch. 917, Sec. 16, eff. Sept. 1, 2001.

Sec. 33.034. REVIEW OF COMMISSION DECISION. (a) A judge who receives from the commission any type of sanction, or a censure issued by the commission under Section 1-a(8), Article V, Texas Constitution, is entitled to a review of the commission's decision as provided by this section. This section does not apply to a decision by the commission to institute formal proceedings.

(b) Not later than the 30th day after the date on which the commission issues its decision, the judge must file with the chief justice of the supreme court a written request for appointment of a special court of review.

(c) Not later than the 10th day after the chief justice receives the written request, the chief justice shall select by lot the court of review. The court of review is composed of three court of appeals justices, other than a justice serving in a court of appeals district in which the judge petitioning for review of the commission's order serves and other than a justice serving on the commission. The chief justice shall notify the petitioner and the commission of the identities of the justices appointed to the court and of the date of their appointment. Service on the court shall be considered a part of the official duties of a justice, and no additional compensation may be paid for the service.

(d) Within 15 days after the appointment of the court of review, the commission shall file with the clerk a charging document that includes, as applicable, a copy of the censure or sanction issued and any additional charges to be considered by the court of review. The charging document is public on its filing with the clerk. On receipt of the filing of the charging document, the clerk shall send the charging document to the judge who is the subject of the document and to each justice on the court of review.

(e) The review by the court under this section:

(1) of a censure is a review of the record of the proceedings that resulted in the censure and is based on the law and facts that were presented in the proceedings and any additional evidence that the court in its discretion may, for good cause shown, permit; and

(2) of a sanction is by trial de novo as that term is used in the appeal of cases from justice to county court.

(e-1) Any hearings of the court shall be public and shall be held at the location determined by the court. Any evidence introduced during a hearing, including papers, records, documents, and pleadings filed with the clerk in the proceedings, is public.

(f) Except as otherwise provided by this section, the procedure for the review of a sanction is governed to the extent practicable by the rules of law, evidence, and procedure that apply to the trial of civil actions generally.

(g) A judge is not entitled to a trial by jury in a review of a sanction under this section.

(h) Within 30 days after the date on which the charging document is filed with the clerk, the court shall conduct a hearing on the charging document. The court may, if good cause is shown, grant one or more continuances not to exceed a total of 60 days. Within 60 days after the hearing, the court shall issue a decision as to the proper disposition of the appeal.

(i) The court's decision under this section is not appealable.

Added by Acts 1987, 70th Leg., 2nd C.S., ch. 47, Sec. 2, eff. Oct. 20, 1987. Amended by Acts 1999, 76th Leg., ch. 462, Sec. 18, eff. June 18, 1999; Acts 2001, 77th Leg., ch. 917, Sec. 17, eff. Sept. 1, 2001.

Amended by:

Acts 2009, 81st Leg., R.S., Ch. 805, Sec. 2, eff. June 19, 2009.

Sec. 33.035. RECONSIDERATION OF COMPLAINT. (a) A complainant may request reconsideration of a dismissed complaint if, not later than the 30th day after the date of the communication

informing the complainant of the dismissal, the complainant provides additional evidence of misconduct committed by the judge.

(b) The commission shall deny a request for reconsideration if the complainant does not meet the requirements under Subsection (a). The commission shall notify the complainant of the denial in writing.

(c) The commission shall grant a request for reconsideration if the complainant meets the requirements under Subsection (a). After granting a request, the commission shall vote to:

(1) affirm the original decision to dismiss the complaint; or

(2) reopen the complaint.

(d) The commission shall notify the complainant of the results of the commission's vote under Subsection (c) in writing.

(e) The commission shall conduct an appropriate investigation of a complaint reopened under Subsection (c)(2). The investigation shall be conducted by commission staff who were not involved in the original investigation.

(f) A complainant may request reconsideration of a dismissed complaint under this section only once.

Added by Acts 2001, 77th Leg., ch. 917, Sec. 18, eff. Sept. 1, 2001.

Sec. 33.036. CERTAIN DISCLOSURE OF INFORMATION. (a) To protect the public interest, the commission may disclose information relating to an investigation or proceeding under this chapter to:

(1) a law enforcement agency;

(2) a public official who is authorized or required by law to appoint a person to serve as a judge;

(3) the supreme court; or

(4) an entity that provides commission-ordered education to judges.

(b) Information may be disclosed under this section only to the extent necessary for the recipient of the information to perform an additional duty or function.

Added by Acts 2001, 77th Leg., ch. 917, Sec. 18, eff. Sept. 1, 2001.

Sec. 33.037. SUSPENSION PENDING APPEAL. If a judge who is convicted of a felony or a misdemeanor involving official misconduct appeals the conviction, the commission shall suspend the judge from office without pay pending final disposition of the appeal.

Added by Acts 2001, 77th Leg., ch. 917, Sec. 18, eff. Sept. 1, 2001.

Sec. 33.038. AUTOMATIC REMOVAL. A judge is automatically removed from the judge's office if the judge is convicted of or is granted deferred adjudication for:

- (1) a felony; or
- (2) a misdemeanor involving official misconduct.

Added by Acts 2001, 77th Leg., ch. 917, Sec. 18, eff. Sept. 1, 2001.

SUBCHAPTER C. JUDICIAL CONDUCT

Sec. 33.051. SOLICITATION OR ACCEPTANCE OF REFERRAL FEES OR GIFTS BY JUDGE; CRIMINAL PENALTY. (a) A judge commits an offense if the judge solicits or accepts a gift or a referral fee in exchange for referring any kind of legal business to an attorney or law firm. This subsection does not prohibit a judge from:

- (1) soliciting funds for appropriate campaign or officeholder expenses as permitted by Canon 4D, Code of Judicial Conduct, and state law; or
- (2) accepting a gift in accordance with the provisions of Canon 4D, Code of Judicial Conduct.

(b) It is an affirmative defense to prosecution under Subsection (a) that:

- (1) the judge solicited the gift or referral fee before taking the oath of office but accepted the gift or fee after taking the oath of office; or
- (2) the judge solicited or accepted the gift or referral fee after taking the oath of office in exchange for referring to an attorney or law firm legal business that the judge was engaged in but was unable to complete before taking the oath of office.

(c) An offense under this section is a Class B misdemeanor.

(d) If, after an investigation, the commission determines that a judge engaged in conduct described by Subsection (a) to which Subsection (b) does not apply, the commission may issue a sanction against the judge or institute formal proceedings, regardless of whether the judge is being prosecuted or has been convicted of an offense under this section.

(e) An attorney or judge who has information that a judge engaged in conduct described by Subsection (a) to which Subsection (b) does not apply shall file a complaint with the commission not later than the 30th day after the date the attorney or judge obtained the information. A judge who fails to comply with this subsection is subject to sanctions by the commission. An attorney who fails to comply with this subsection is subject to discipline by the Commission for Lawyer Discipline under Subchapter E, Chapter 81.

(f) For purposes of this section:

(1) "Judge" does not include a constitutional county court judge, a statutory county court judge who is authorized by law to engage in the private practice of law, a justice of the peace, or a municipal court judge, if that judge or justice of the peace solicits or accepts a gift or a referral fee in exchange for referring legal business that involves a matter over which that judge or justice of the peace will not preside in the court of that judge or justice of the peace.

(2) "Referral fee" includes forwarding fees, acknowledgment fees, and any form of payment, benefit, or compensation related to the referral or placement of a potential client for legal services.

Added by Acts 2003, 78th Leg., ch. 850, Sec. 1, eff. Sept. 1, 2003.